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Negotiating at the Interface of Power and Law: The Crime of Aggression

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Articles

Negotiating at the Interface of Power and Law: The Crime of Aggression

BETH VAN SCHAACK*

Delegates recently convened in Kampala, Uganda to lay the groundwork for the International Criminal Court's eventual prosecution of the crime of aggression. This achievement caps decades of negotiations that began in the post-World War II period. From virtually the beginning of the negotiations, it was argued that an aggression prosecution should not go forward absent some definitive showing that a state had committed a predicate act of aggression. Delegations diverged on which body—the Security Council or the court itself—should be empowered to determine whether a predicate act of aggression had occurred and whether it was necessary for the putative aggressor state(s), the victim state(s), or both, to have consented to the court's jurisdiction before a prosecution could proceed. The end product was an unimpeacha-

* B.A., Stanford University; J.D., Yale Law School. I served on the U.S. delegation to the International Criminal Court Review Conference in 2010 in Kampala, Uganda as the Academic Advisor. Needless to say, the views expressed herein (and any errors) are entirely my own and do not reflect the position of the government of the United States. All material contained in this Article is available in the public record or is derived from my notes of the Review Conference. I am indebted to Todd Buchwald, John Daley, David Koplow, William K. Lietzau, Teresa McHenry, Jonathan Morganthau, Diane Orentlicher, Michael Surgalla, Ron Slye and Allen Weiner for their assistance with this article. Diane Amann, Stefan Barriga, Catherine Brölmann, Meg DeGuzman, Saira Mohamed and David Sloss gave valuable comments on the draft. Special thanks go to Harold Hongju Koh and Stephen Rapp for inviting me to join the U.S. delegation in Kampala. Thanks also go to Martin Guerbadot, Nicola Gladitz and Mary Sexton for their excellent research assistance. I am also grateful to the *Columbia Journal of Transnational Law* for their excellent work on this piece. Some of this research is also featured in the series on the crime of aggression on IntLawGrrls, <http://intlawgrrls.blogspot.com/search/label/Crime%20of%20aggression%20series>.

ble regime of state consent that completely insulates the nationals of Non-Party States from prosecution and allows States Parties to opt out of the crime entirely. The results achieved in Kampala have subtly eroded the primacy of the Security Council, as states revealed a preference for a consent-based regime and a willingness to extend international criminal jurisdiction to their own nationals and over their own foreign policies. Indeed, the aggression amendments may have actually diminished the efficacy of the Council's pre-existing referral power and created the potential for greater conflict between the Council and the court. The outcome in Kampala thus presents a microcosm of the continual thinning of state sovereignty and the indelible shift in the balance between power and law in international relations. This Article examines the aggression amendments and the process by which they were adopted, concluding with a discussion of the way in which the negotiations and the final amendments invoked and rebalanced the central themes of power politics, state consent and judicial independence within public international law.

INTRODUCTION	507
I. NEGOTIATING A CRIME OF AGGRESSION.....	509
A. <i>Post-World War II Efforts to Codify the Crime of Aggression</i>	511
B. <i>The Kampala Review Conference</i>	512
C. <i>The Negotiating Dynamics</i>	513
II. NEGOTIATION CHRONOLOGY IN KAMPALA	519
A. <i>The Definition of the Crime Prior to Kampala</i>	520
B. <i>The State of Play Vis-à-Vis Jurisdiction Prior to Kampala</i>	523
1. <i>The Debates over the Entry into Force Provisions and Jurisdictional Preconditions Before Kampala</i> ...	524
2. <i>The Debates over Jurisdictional Filters Pre-Kampala</i>	533
3. <i>State Preferences on the Eve of Kampala</i>	537
C. <i>The Foundation for Negotiations in Kampala</i>	539
D. <i>The Arc of the Kampala Negotiations</i>	542

<i>E. The Provisions Adopted</i>	556
III. ELEMENTS OF THE PACKAGE.....	559
<i>A. Judicial Independence Versus Security Council Supremacy in International Peace and Security</i>	560
1. The Security Council Filter.....	560
2. Alternative Filters: The International Court of Justice and the General Assembly	568
<i>B. Existing Security Council Control Mechanisms</i>	573
<i>C. State Consent</i>	578
1. The Opt Out	584
2. The Exclusion of Non-Party States.....	591
<i>D. Delay</i>	592
<i>E. Staggered Entry Into Force</i>	593
<i>F. Activation Mechanism</i>	595
CONCLUSION	598

INTRODUCTION

State representatives recently completed marathon negotiations, resulting in the insertion of amendments¹ into the Statute of the International Criminal Court (ICC or the court) and laying the groundwork for the eventual prosecution of the crime of aggression. In so doing, negotiators achieved a goal that the original drafters of the treaty had been unable to accomplish initially and completed a task the international community has been struggling with for decades. Throughout this process, state representatives hovered between two competing and ultimately irreconcilable positions. At one pole rests the contested dogma of Security Council (the Council) exclusivity in the face of breaches of the peace; at the other pole rests the conviction that the ICC, as a judicial and penal body, should be empowered to act independently, beyond the control of any political body and independent of the consent of states. Concessions and the moderation of interests are always predictable in the context of multilateral negotiations, but in this case, the compromise between these two positions resulted in an unprincipled and potentially unworkable

1. Res. RC/Res.6, U.N. Doc. RC/Res.6 (June 11, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [hereinafter Aggression Resolution].

system that betrays both imperatives. Instead of either empowering the Council to control aggression prosecutions or granting the court free reign to prosecute crimes of aggression, delegates adopted a regime of state consent—premised on an opt-out option and the complete exclusion of Non-Party States—to limit the court's reach. The outcome was facilitated by confusion over which of several competing amendment procedures should govern the aggression amendments. This uncertainty created an opening for creative, if not frenzied, juggling of various potential solutions to the jurisdictional impasse. Indeed, the entry into force provision became the lynchpin of the entire package. In the end, delegates decided upon a delayed and conditional operationalization of the crime of aggression, subject to a further decision by the Assembly of States Parties (ASP) by at least 2017 to allow some combination of the three trigger mechanisms—the Security Council, state party referrals and the Prosecutor acting *proprio motu*—to function.

In Parts I through III, this Article examines the process by which the aggression amendments were adopted. Part I introduces the central themes at issue, presents a short history of multilateral efforts to codify the crime and its jurisdictional regime and introduces the negotiating dynamics. Because it remained unchanged from the start of the recent Review Conference, the definition of aggression is considered tangentially only insofar as it exerted an influence on the jurisdictional regime under development.² Part II provides a thick description of the arc of the most recent negotiations and recounts states' recurring efforts to mix and match jurisdictional elements both to reach a consensus outcome and to avoid either a contentious vote or further deferral of the entire project. Part III discusses the validity of the substantive arguments made by negotiating states and their rhetorical impact and offers a critique of the negotiation process. The Article closes with a discussion of how the negotiations and the final amendments invoked and rebalanced central themes of public international law—power politics, state consent and judicial independence—particularly with regard to the role of the Security Council in managing threats to and breaches of the peace. Notwithstanding a suggestion in the original ICC Statute that there should be greater harmonization between the ICC and the Security Council in the ag-

2. This Article focuses on the jurisdictional regime governing the crime of aggression; a companion piece will focus on the definition of the crime. See Beth Van Schaack, *The Grass That Gets Trampled When Elephants Fight: Will the Codification of the Crime of Aggression Protect Women?*, 15 UCLA J. INT'L L. & FOREIGN AFF. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1676506.

gression context,³ the Security Council was not ultimately accorded any additional powers vis-à-vis aggression prosecutions by states. Indeed, the aggression amendments may have actually diminished the efficacy of the Council's pre-existing referral power⁴ and created the potential for greater conflict between the Council and the court. The results achieved in Kampala have thus subtly eroded the primacy of the Security Council, as a vast majority of states revealed a preference for an unimpeachable consent-based regime and a willingness to extend international criminal jurisdiction to their own nationals and over their own foreign policies. The outcome in Kampala is thus a microcosm of the continual thinning of state sovereignty and the indelible shift in the balance between power and law in contemporary international relations.

I. NEGOTIATING A CRIME OF AGGRESSION

The idea of prosecuting those who launch unjust wars has deep roots,⁵ although it was not until the post-World War II era that

3. Rome Statute of the International Criminal Court, art. 5(2), U.N. Doc. A/CONF.183/9 (July 17, 1998, corrected by *procès-verbaux* of Nov. 10, 1998, July 12, 1999, Nov. 30, 1999, May 8, 2000, Jan. 17, 2001 and Jan. 16, 2002) [hereinafter ICC Statute] (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”), available at http://untreaty.un.org/cod/icc/statute/english/rome_statute%28e%29.pdf.

4. See Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 355 (2009) (describing international criminal law as “a mechanism for achieving reform of the Security Council over the long haul by gradually hiving off parts of its mandate and authority.”).

5. Just war theory goes back centuries. See generally THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY WRITINGS (Larry May et al. eds., 2006) (compiling excerpts from just war theorists). In the face of atrocities committed during World War I, the victorious Allies and Associated Powers convened a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to inquire into culpable conduct of particular individuals—“however highly placed”—accused of breaching international law. Foreshadowing the notion of crimes against the peace later developed at Nuremberg and Tokyo, the Commission considered “not strictly war crimes, but acts which provoked the war or accompanied its inception,” such as deliberate violations of the neutrality of Belgium and Luxembourg. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference (March 29, 1919), reprinted in 14 AM. J. INT’L L. 95, 118 (1920). See generally Sheldon Gleuck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 401–03 (1946). Notwithstanding early support for prosecuting the Kaiser and others for initiating World War I, the Commission adopted the U.S. position and concluded that acts of aggression should

the international community identified the launching of an aggressive war as a criminal act. In the lexicon of the era, this was deemed a “crime against the peace.”⁶ Indeed, it was this crime—rather than genocide—that became the centerpiece of the Nuremberg trial, which was to be the “trial to end all wars.”⁷ This pride of place reflected the reasoning, set forth in the Judgment of the International Military Tribunal convened at Nuremberg, that aggressive war was the proximate cause of all of World War II’s atrocities: “To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁸

Defining and prosecuting aggressive war, although not uncontroversial,⁹ proved relatively easy following the complete defeat of the states responsible for acts of aggression in World War II.¹⁰ How-

not be the subject of prosecution in light of the lack of legal authority for such a charge and the complexity of undertaking an investigation into the politically charged question of the causes of the war, which it viewed as a question for historians and statesmen, rather than a penal tribunal. *Id.* at 402 (noting that the Commission concluded that determining the “authorship of the war would entail many handicaps of proof”).

6. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Protocol, Aug. 8, 1945, art. 6(a), 59 Stat. 1544, 82 U.N.T.S. 279 (defining crimes against the peace).

7. David Luban, *The Legacies of Nuremberg*, 54 SOC. RES. 779, 781 (1987). The quote is a riff on President Woodrow Wilson’s too optimistic prediction that World War I would be the “war to end all wars.” RALPH KEYES, THE QUOTE VERIFIER 239–40 (2006). Crimes against the peace took center stage in Tokyo too, overshadowing the many war crimes and crimes against humanity that were committed in the Pacific theater. *See* 101–103 THE TOKYO MAJOR WAR CRIMES TRIAL 48,413–49,591 (R. John Pritchard, ed. 1998) (discussing crimes against the peace) [hereinafter TOKYO JUDGMENT]; *id.* at 49,591–49,761 (recounting conventional war crimes and other atrocities).

8. International Military Tribunal (Nuremberg), Judgment (Oct. 1, 1946), *reprinted in* 41 AM. J. INT’L L. 172, 186 (1947) [hereinafter Nuremberg Judgment].

9. The notion of crimes against the peace was the most controversial element of the Charter at the time. *See* F.B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT’L L. 770, 783 (1947) (“Most controversial among the broad legal aspect of the Nuremberg Trial is the basic concept that aggressive war is not only illegal in international law but that those ‘who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.’”) (quoting the Nuremberg Judgment); *see also* George Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT’L L. 20, 25–37 (1947); Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 62–67 (1947).

10. The Nuremberg Tribunal convicted twelve of nineteen defendants indicted for crimes against the peace in Count 2. Although in Count 1 the Prosecution indicted all

ever, when the international community turned its attention to building what would eventually be known as the International Criminal Court, controversies emerged to stymie efforts to codify the crime for more general application in the future.

A. Post-World War II Efforts to Codify the Crime of Aggression

The International Law Commission, the first body to undertake the effort, was unable to agree on a definition of the crime of aggression; this indecision ultimately delayed progress on the ICC project for years.¹¹ Starting in 1967, the UN General Assembly tasked several special committees to define aggression.¹² This effort eventually led to a consensus definition in General Assembly Resolution 3314 (1974) that was meant to guide the Security Council in implementing its peace and security mandate.¹³ After a period of Cold War quiescence, the ICC idea was revived and states again sought to define the crime.¹⁴ While influential, the definition of aggression in Resolution 3314 did not easily lend itself to a penal context, so other options were explored.¹⁵ Delegates attending six sessions of Prepara-

twenty-four defendants for engaging in a common plan or conspiracy to commit crimes against peace, the Tribunal only convicted eight defendants for this crime. Nuremberg Judgment, *supra* note 8, at 333. The Tokyo Tribunal convicted twenty-six out of twenty-eight defendants for waging aggressive war. 103 TOKYO JUDGMENT, *supra* note 7, at 49,773–49,858 (recounting verdicts).

11. Draft Code of Offences Against the Peace and Security of Mankind, G.A. Res. 897 (IX), U.N. Doc. A/RES/897(IX) (Dec. 4, 1954) (postponing work on the Draft Code in light of the convening of a Special Committee of representatives from nineteen member states to consider the crime of aggression).

12. *See, e.g.*, Question of Defining Aggression, G.A. Res. 895 (IX), U.N. Doc. A/RES/895(IX) (Dec. 4, 1954) (creating a Special Committee to prepare and submit a report on the question of defining aggression).

13. Definition of Aggression, G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

14. *See* Draft Code of Offenses Against the Peace and Security of Mankind, G.A. Res. 33/97, U.N. Doc. A/RES/33/97 (Dec. 16, 1978) (according priority to the Draft Code of Offenses Against the Peace and Security of Mankind in light of the completion of a definition of aggression); Draft Code of Offenses Against the Peace and Security of Mankind, G.A. Res. 36/106, U.N. Doc. A/RES/36/106 (Dec. 10, 1981) (inviting the ILC to resume its work on the Draft Code).

15. *See, e.g.*, Int'l Criminal Court, Assembly of States Parties, Special Working Grp. on the Crime of Aggression, 5th Sess., Nov. 23–Dec. 1, 2006, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ¶¶ 7–13, U.N. Doc. ICC-ASP/5/SWGCA/INF.1 (Sept. 5, 2006), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-SWGCA-INF1_English.pdf (discussing debates over

tory Committees in 1996–1998 and the 1998 Rome Conference, where the ICC Statute was finally opened for signature, were again unable to agree on the definition of aggression or on a jurisdictional regime to govern the crime’s prosecution. And so almost everyone agreed to punt, listing the crime within the court’s jurisdiction at the last minute¹⁶ but delaying consideration of the remaining details to a mandatory Review Conference to be convened in seven years.¹⁷ The only guidance the negotiators in Rome offered their successors was the cryptic declaration in Article 5(2) of the ICC Statute that any pre-conditions for the exercise of jurisdiction over the crime of aggression should be “consistent with the relevant provisions of the Charter of the United Nations.”¹⁸ A series of Preparatory Commissions (1999–2002), Special Working Groups (2003–2009) and informal gatherings held at Princeton University (2004–2007) then took up the task in the period leading up to the planned 2010 Review Conference in Kampala, Uganda.

B. The Kampala Review Conference

Despite years of multilateral negotiations pre- and post-Rome, delegates arrived at the Review Conference with the most contentious issues still undecided, although the definition of the crime enjoyed a shaky consensus.¹⁹ The perennial difficulty of reaching consensus on when and how to prosecute the crime of aggression stemmed from the recognition that the crime by its nature involves

whether Resolution 3314 could provide a penal definition and suggesting alternatives, including the World War II definition of crimes against the peace).

16. Andreas Zimmerman, *Article 5, Crimes Within the Jurisdiction of the Court*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 97, 104–05 (Otto Triffterer ed., 1999) (noting lack of consensus in Rome over the definition of the crime of aggression).

17. ICC Statute, *supra* note 3, art. 123 (providing for a mandatory Review Conference to consider amendments to the Statute, including the list of crimes contained in Article 5).

18. ICC Statute, *supra* note 3, art. 5(2). (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime. Such provision shall be consistent with the relevant provisions of the Charter of the United Nations.”).

19. Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, in THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009, 1, 3 (Stefan Barriga et al. eds., 2009) (noting that the definitional issues “could be regarded as contained, but not necessarily as resolved”).

both state action and individual conduct. From virtually the beginning of the negotiations, it was argued that an aggression prosecution should not go forward absent some definitive showing that a state had committed a predicate act of aggression.²⁰ Where delegations diverged was in deciding which body should be empowered to determine this consensus: the oligarchic Security Council, in keeping with its role under the UN Charter as the guarantor of peace and security, or a different body, including perhaps the court itself. Because state action was a central element of an aggression prosecution, delegates also raised the question of whether it was necessary for some state—the putative aggressor state(s), the victim state(s) or all of the above states—to have consented to the court’s jurisdiction before a prosecution could proceed. Although these two issues—the role of the Security Council and state consent—were present in Rome, they emerged in starker relief in Kampala.

C. *The Negotiating Dynamics*

Indeed, the negotiating dynamics in Kampala were considerably more complex than they had been in Rome. In Rome, the so-called “Like-Minded States,”²¹ overwhelmingly supported by the non-governmental organization (NGO) community, were able to garner a large and disparate alliance in favor of a strong and largely independent Court.²² In Kampala, by contrast, the negotiations over

20. See Int’l Criminal Court, Assembly of States Parties, Official Records on its 4th Sess., Nov. 28–Dec. 3, 2005, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, June 13–15, 2005, ¶ 63, U.N. Doc. ICC-ASP/4/32, Annex II.A (2005) [hereinafter June 2005 SWGCA Report], available at <http://www.icc-cpi.int/NR/rdonlyres/D224718C-39EF-477C-B028-F434F4BF78AE/0/Annexes.pdf> (“While there was general agreement that any provisions on the crime of aggression would have to be consistent with the Charter, there were considerable differences of opinion as to whether this implied that there had to be a prior determination of the act of aggression and whether such determination fell within the exclusive competence of the Security Council.”); see also Giorgio Gaja, *The Long Journey Towards Repressing Aggression*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 427, 433 (Antonio Cassese et al. eds., 2002) (recounting pre-Rome efforts to establish a Security Council filter for the crime of aggression).

21. The Like-Minded States comprised the Europeans—with the exception of the United Kingdom and France who remained aligned with the other members of the Security Council for the majority of the Rome Conference—and many developing nations. Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 20, at 67, 70–71 (discussing negotiating dynamics in Rome).

22. *Id.*

the crime of aggression splintered along more diverse fault lines. Prominent in one camp were China, France, Russia, the United Kingdom and the United States, the permanent five members of the Security Council (known as the P-5), along with a few key allies, who sought to place limits on the definition of aggression. In particular, this camp insisted that the UN Charter and policy considerations required that the Security Council have the exclusive power to control prosecutions for the crime of aggression.²³ A second camp—featuring many members of the group of Latin American and Caribbean Countries (GRULAC), the so-called “African Group” of States Parties, a handful of European states and other smaller States Parties—defended the expansive definition of the crime.²⁴ They also pushed for a jurisdictional regime that would apply without requiring state consent and would be unfettered by the Security Council²⁵ (or at least no more fettered than it was vis-à-vis the original core crimes of genocide, crimes against humanity and war crimes).²⁶ Although members of this “coalition” made impassioned interventions, it was never clear to what extent their united public stance belied a more deep-seated ambivalence toward the crime. A third group of diverse States Parties were wary of according the Security Council hegemony on the question of aggression but did not share the larger coalition’s visions of an expansive aggression regime. They sought alternative ways to cabin the court’s jurisdiction over the crime that would not alienate the Council’s permanent members.²⁷ NGOs were also split. Some remained agnostic toward the crime on the ground

23. See *infra* text accompanying notes 204–210.

24. See *infra* text accompanying notes 48–63.

25. See *infra* text accompanying notes 110–114.

26. The original Statute empowers the Security Council to defer a prosecution for a renewable one-year period. See ICC Statute, *supra* note 3, art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”). Earlier drafts of this provision had required Security Council approval before a prosecution could go forward. See Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT’L L. 1503, 1509–10 (2002). The exercise of the veto would have blocked a prosecution. *Id.* In 1997, Singapore proposed flipping the presumption to allow the Security Council to halt a prosecution. *Id.* at 1510–11. Delegates ultimately adopted the so-called “Singapore Compromise” in Rome. *Id.* at 1510 n.37. Under the current system, the exercise of the veto allows a prosecution to go forward. *Id.* at 1511.

27. See *infra* text accompanying notes 153–160.

that it ostensibly fell outside their mandate,²⁸ others opposed it out of fear that it would distract the court from the atrocity crimes,²⁹ and still others supported the crime as a way to prevent the commission of other crimes within the court's jurisdiction and bring about a more peaceful world.³⁰

In the end, the P-5's two sets of interlocutors found themselves drawn toward two irreconcilable positions. One position—idealistic, if not hopelessly naïve—was premised on an independent Court capable of exercising a universal form of jurisdiction over the crime of aggression. The other position—a more cautious one articulated most often by the Canadian delegation—insisted that jurisdiction be premised on some manifestation of state consent.³¹ These groups ought to have been natural allies against the P-5's position that the Council should control aggression prosecutions. However, they struggled to overcome collective action problems and find common ground on a jurisdictional package that did not involve the Security Council, despite a host of creative solutions put forward in Kampala. For their part, the P-5 also had difficulty asserting their full influence. With China, Russia and the United States all serving as observers during the negotiations, and the United States a late-

28. Amnesty International, for example, claimed neutrality, although it did take positions on elements of the jurisdictional regime, insisting, for example, on no Security Council control over the crime and no right of States Parties to opt out. Amnesty Int'l, *International Criminal Court: Making the Right Choices at the Review Conference*, at 11–15, AI Index IOR 40/008/2010 (Apr. 21, 2010), available at <http://www.amnesty.org/en/library/asset/IOR40/008/2010/en/faad9888-c9fb-425a-98bc-fccel1d5e075f/ior400082010en.pdf>; see also Coalition for the Int'l Crim. Ct., *The Crime of Aggression*, <http://www.iccnw.org/?mod=aggression> (“The CICC as a whole did not take a position concerning the adoption of specific provisions on the crime of aggression at Kampala. This was because CICC members developed varying positions concerning the complex discussions on the crime.”).

29. See, e.g., Hum. Rts. Watch, *Making Kampala Count*, 1 (May 10, 2010), <http://www.hrw.org/en/reports/2010/05/10/making-kampala-count> (“We fear that inclusion of a definition and jurisdictional filter could diminish the court's role—and the perceptions of that role—as an impartial judicial arbiter of international criminal law.”).

30. See Jutta F. Bertram-Nothnagel, Director of Relations of Intergovernmental Organizations, Union International des Avocats, Statement at the Review Conference of the International Criminal Court, Kampala, Uganda (June 4, 2010) (on file with author) (arguing for the adoption of an effective amendment adding the crime of aggression); see also Fédération Internationale des Droits de l'Homme, *ICC Review Conference: Renewing Commitment to Accountability*, 24 (May 25, 2010), <http://www.fidh.org/IMG/pdf/KampalaCPI543a-2.pdf> (arguing for the independence of the ICC vis-à-vis the crime of aggression).

31. See *infra* text accompanying notes 153–156.

comer at that,³² it was left to France and the United Kingdom (the P-2) to formally defend postwar privileges. Legal arguments in favor of Council exclusivity in the aggression realm proved unconvincing in light of contemporary UN practice.³³ Policy arguments, in turn, were never persuasively developed and were in any case undermined by the Security Council's checkered history of responding to breaches of the peace.³⁴ States that in the past might have been convinced to endorse a strong, if not exclusive, role for the Council instead espoused voluntarist attitudes that undercut the preferences of the P-5.

The coalition of GRULAC and African States Parties ostensibly had overwhelming numbers on its side if the decision came down to a vote. Nonetheless, the threat of a contentious vote in Kampala was ultimately defused given the demographics of the Conference,³⁵ the governing voting rules and principled arguments that adding such a controversial crime to the ICC Statute should be accomplished by consensus or not at all.³⁶ The ICC Statute makes clear that amend-

32. The United States did not start participating in the formal negotiations until November 2009. *See generally* Bill Marmon, *As ICC Starts Major Review, Can U.S. and EU Cooperate?*, EUR. AFF. (June–July 2010), <http://www.europeaninstitute.org/201006041034/June-July-2010/as-icc-starts-major-review-can-us-and-eu-cooperate.html> (“All their political skills will be needed if the U.S. is to manage its nuanced diplomatic goals in Kampala and beyond without appearing hypocritical, or opportunistic, or obstructive, or unilaterally hubristic—or all of the above.”). This renewed engagement replaced the overt hostility toward the court that characterized the first term of the George W. Bush Administration. *See* Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. (SUPP.) 381, 384, 404 (2002).

33. *See infra* text accompanying notes 225–234.

34. *See* Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive Is the Security Council's Power To Determine Aggression?*, 16 IND. INT'L & COMP. L. REV. 1, 8 (2005) (“The Security Council is a political body, and it has used the term ‘aggression’ in its resolutions in a political way. The Security Council has not found the existence of aggression where aggression was most obvious, and it has found aggression in borderline cases.”).

35. *See* Niels Blokker & Claus Kreß, *A Consensus Agreement on the Crime of Aggression: Impressions from Kampala*, 23 LEIDEN J. INT'L L. 889, 891 (2010) (noting the lack of a credible threat of a vote); *see also* Delegations to the Review Conference of the Rome Statute of the International Criminal Court, U.N. Doc. RC/INF.1 (Aug. 26, 2010) (listing delegations present in Kampala), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-INF.1-reissued-ENG-FRA-SPA.pdf.

36. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Statement at the Review Conference of the International Criminal Court, Kampala, Uganda (June 4, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/142665.htm> [hereinafter Koh, U.S. Intervention]; *see also* Blokker & Kreß, *supra* note 35, at 891 (noting that most states agreed that a vote would be divisive).

ments to the treaty are ideally to be approved by consensus, but the relevant provision also allows amendments to be adopted by a two-third majority of the Assembly of States Parties in the event that a consensus cannot be reached.³⁷ There were compelling arguments that the aggression amendments in particular should be adopted by consensus rather than through a contested vote, especially where a raw “majority rules” approach determined the resort to a vote as well as the result. This question of procedure was framed as crucial to the court’s and the amendments’ very legitimacy in light of the larger principle that reaching consensus is the only valid decision-making rule for issues of constitutional import such as the adding of a complex and controversial crime to the court’s subject matter jurisdiction.³⁸ Otherwise, it was argued that the amendments’ divisive provenance would call every prosecution for aggression into question. The United States emerged as the strongest proponent for a consensus outcome.³⁹ Many delegations echoed this call, although often in the same breath in which they pleaded for compromise. In the background of this meta-conversation about process, the history of the Rome Conference loomed. There, the United States was marginalized when it proposed an ill-advised last minute amendment to the final package. The amendment failed on a resounding no action motion, and again on an unrecorded but easily deciphered end-of-proceedings vote that clearly revealed the extent of the United States’s isolation.⁴⁰

The threat of a vote hung over the Kampala proceedings like Damocles’ sword, although it was never entirely clear whether even a

37. ICC Statute, *supra* note 3, art. 121(3) (“The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”); *see also* I.C.C. Res. ICC-ASP/6/Res.2, Annex IV, Draft Rules of Procedure of the Review Conference, R. 49, 51, *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP6-Res-02-ENG.pdf [hereinafter Review Conference Rules].

38. Koh, U.S. Intervention, *supra* note 36 (“In the history of the International Criminal Court, the definitions of all of the crimes over which the Court has jurisdiction and all of the elements of these crimes have been adopted by consensus. We should not deviate from that decision-making principle for these even more sensitive and highly-charged offenses.”).

39. *See, e.g., id.*

40. *See* Beth Van Schaack et al., *International Service for Human Rights Dossier on the International Criminal Court* 3 n.14 (Santa Clara Sch. of Law Legal Stud. Res. Papers Ser., Working Paper No. 10-07, June 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628317; Kirsch & Robinson, *supra* note 21, at 77 (recounting votes); William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 119–20 (2001) (describing U.S. marginalization in multilateral treaty negotiations).

vote could result in a conclusive outcome. According to the rules, an amendment could be adopted by two-thirds of the full membership of the Assembly of States Parties.⁴¹ With 111 States Parties, a two-thirds vote required the consent of 74 States Parties. On June 9, the Credentials Committee reported that 72 States Parties had submitted the necessary credentials to be entitled to vote, if necessary.⁴² Latvia subsequently submitted its credentials.⁴³ Mid-conference, five states in arrears—Burundi, Central African Republic, Comoros, Djibouti and Nauru—were given exemptions from lost voting rights.⁴⁴ Additional states submitted “information concerning the appointment of representatives,” bringing the number of potential voting states up to 85, which still meant that virtual unanimity would be required to pass anything with a vote.⁴⁵ Without the credible threat of a vote, mere numbers alone were insufficient to enable the coalition to assert its full weight against the enduring muscle of the permanent members of the Security Council and their few influential and vocal allies or to sway states that wanted a solution the P-5 could accept.⁴⁶

Furthermore, there was the lingering uncertainty about how deep the support for making the prohibition of aggression operational really was among ostensibly concurring delegations. Nor was it clear what instructions delegates in Kampala would receive if they were forced to call their capitals in the event of a vote. Although key groups within the coalition—such as the Union of South American Nations, under the de facto leadership of Brazil, and the so-called “African Group” of States Parties, led by South Africa—espoused consistent support for expansive aggression amendments, certain coalition members at times seemed to approach the negotiations primarily as an opportunity to score points on a larger Security Council reform agenda. Brazil in particular was clearly endeavoring to play a

41. See Review Conference Rules, *supra* note 37.

42. See Valerie Oosterveld, *Final Day in Kampala*, INTLAWGRRLS (June 11, 2010), <http://intlwgrrls.blogspot.com/2010/06/final-day-in-kampala.html>; Astrid Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression—at Last . . . in Reach . . . over Some*, 2 GÖTTINGEN J. INT'L L. 745, 764 n.109 (2010) (discussing credentials).

43. Oosterveld, *supra* note 42.

44. *Id.*

45. *Id.*

46. The Rules of the Review Conference, however, also seemed to allow provisions to be adopted piecemeal by a vote of two-thirds of those present and voting rather than two-thirds of the full Assembly of States Parties. Review Conference Rules, *supra* note 37, R. 53, 55, 60. This presented the distasteful outcome whereby each individual provision would be adopted by two-thirds of those present and voting, but the final package would fail.

big power role in opposition to the P-5, perhaps to burnish its reputation with the states of the so-called Non-Aligned Movement.

In the end, all sides recognized that their negotiating leverage was at its maximum in Kampala, under the crucible of waning time and pressing travel schedules. No one seemed to relish taking these issues up again or risking a re-negotiation of settled issues in the fall at the Assembly of States Parties in New York. This was the case even though the voting dynamics would likely have been more favorable for those delegations that seemingly favored the full and immediate implementation of the crime.

With a contested vote effectively foreclosed, compromise became inevitable. In the end, the pro-codification coalition abandoned its ideals and backed a regime of state consent with retrograde elements—one that completely insulates the nationals of Non-Party States from prosecution and allows States Parties to opt out of the crime entirely—in order to defeat one controlled by the Security Council. This concession attests to the extreme—if not irrational—antipathy felt by many states toward the Council. Speaking through France and the United Kingdom—the only members of the P-5 with the power to break consensus—the P-5 reluctantly assented to the final package.⁴⁷ The next Part recounts in greater detail how this result was ultimately achieved. It is followed by an analysis of the adopted and rejected provisions with reference to key principles of public international law.

II. NEGOTIATION CHRONOLOGY IN KAMPALA

To a certain degree, the story of the aggression negotiations in Kampala is a story about jurisdiction rather than definition. Although all elements of the aggression provisions were open to negotiation in Kampala, the definition of the crime had strong support. Even France and the United Kingdom had ceased their efforts to revise the definition under consideration, although they later argued

47. Blokker & Kreß, *supra* note 35, at 890. The authors note that:

It is much to be welcomed that the United Kingdom and France eventually decided not to block the consensus on the basis of their claim to a Security Council monopoly. It would be mistaken, however, to interpret this final move as the acceptance of a weakening of the paramount Security Council's powers in the field of international peace and security. By eventually refraining from overstressing their competences, the United Kingdom and France have made a wise decision which can only be conducive to strengthening the acceptance of their privileged position as permanent members of the Security Council.

Id. at 894.

that their silence should not be construed to indicate support for the text. Accordingly, the negotiations up to and during the Review Conference focused almost exclusively on the jurisdictional regime to govern the crime, although the United States did attempt to massage the definition with interpretive understandings. After a brief discussion of the final definitional provisions, this Part discusses the open jurisdictional issues to lay the foundation for understanding the dynamics of the Kampala negotiations.

A. The Definition of the Crime Prior to Kampala

By June 2008, the Special Working Group on the Crime of Aggression had removed all brackets⁴⁸ from the definition of aggression contained in draft Article 8bis.⁴⁹ The Working Group submitted this definition to the ASP in February 2009.⁵⁰ The definition resisted

48. Brackets in a treaty indicate contested or tentative text. *See* Int'l Criminal Court, Assembly of States Parties, Official Records on its Resumed 6th Sess., June 2–6, 2008, *Report of the Special Working Group on the Crime of Aggression*, Attachment, *Draft Amendments to the Rome Statute of the International Criminal Court*, U.N. Doc. ICC-ASP/6/20/Add.1, Annex II (2008). The aggression amendments have been denominated Article 8bis (definition) and Articles 15bis and 15ter (jurisdiction). *See* Aggression Resolution, *supra* note 1. All other Articles referenced herein appear within the Statute as adopted at Rome in 1998.

49. The definition of the crime appears in Article 8bis:

For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression .

...

Aggression Resolution, *supra* note 1, Annex I, art. 8bis(1)–(2).

50. Int'l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess. (1st & 2d Resumptions), Jan. 19–23, Feb. 9–13, 2009, *Report of the Special Working Group on the Crime of Aggression*, U.N. Doc. ICC-ASP/7/20/Add.1, 2d Resumption, Annex II (2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-20-Add.1%20English.pdf; *see also* Int'l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess. (1st & 2d Resumptions), Jan. 19–23, Feb. 9–13, 2009, *Proposals for a Provision on Aggression Elaborated by the Special Working Group on the Crime of Aggression*, Appendix, U.N. Doc. ICC-ASP/7/SWGCA/2, Annex I (2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP7R2/ICC-ASP-7-SWGCA-2-ENG.pdf.

amendments from this point forward.⁵¹ Although the absence of brackets suggested consensus, several states remained ill at ease with the definition, most vocally the United States once it began participating in the aggression negotiations in November 2009. These uneasy states maintained that Article 8bis(2) is worded in such a way⁵² that it deems any violation of the territorial integrity, political independence or sovereignty of another state, as well as any use of armed force that is inconsistent with the UN Charter, to be an “act of aggression.”⁵³ Accordingly, the mere crossing of an international border by military forces without the consent of the neighboring state, for example, could be condemned as an “act of aggression,” regardless of the circumstances, the gravity or consequences of the state’s actions or the motive/intent behind the operation.⁵⁴ Because the definition of the crime contains no express reference to codified or uncodified exceptions to the UN Charter’s prohibition on the use of armed force, such an act could serve as the predicate to a prosecution for the “crime of aggression.”⁵⁵ This is notwithstanding that both Article 2(4) of the UN Charter and Resolution 3314 envision unlawful uses of force as existing along a continuum, with aggression at the far end of egregiousness.

51. Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair’s Perspective*, 23 LEIDEN J. INT’L L. 883, 883 (2010).

52. See Aggression Resolution, *supra* note 1, Annex II, art. 8bis, Elements, para. 3 (defining “act of aggression” as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”).

53. This language, with the exception of the added reference to “sovereignty” and the deletion of the concept of a threat to peace, is drawn from Article 2(4) of the UN Charter. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

54. The elements of the crime of aggression better link the definition of act of aggression to the UN Charter system when they state that “[t]he perpetrator was aware of the factual circumstances that established that such a use of armed force [i.e., the act of aggression] was inconsistent with the Charter of the United Nations.” Aggression Resolution, *supra* note 1, Annex II, art. 8bis, Elements, para. 4.

55. Article 8bis(1) defines the crime of aggression as

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Id., Annex I, art. 8bis(1).

For any act to support a prosecution of the crime of aggression, it must satisfy the requirements set forth in Article 8bis(1) of the amendments. That provision lists a number of acts of aggression that fall within the prohibition against aggression if they constitute a “manifest” violation of the UN Charter.⁵⁶ The term “manifest,” which was never defined, emerged as a compromise modifier to bridge a gap between two groups of delegates. One group of delegates wanted no threshold at all, on the theory that every act of aggression should be subject to prosecution.⁵⁷ The other group of delegates wanted a higher threshold, one that would limit prosecutions to “flagrant” breaches of the Charter,⁵⁸ wars of aggression,⁵⁹ “unlawful” uses of force or acts of aggression geared toward occupying or annexing territory. Germany, for example, supported a high threshold for the crime, requiring proof that the act of aggression had “the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by the armed forces of the attacking State.”⁶⁰

Without a consensus as to the definition, the term “manifest” remained controversial and indeterminate.⁶¹ To some negotiators, it

56. *Id.*, Annex I, art. 8bis(2)(a)–(g).

57. Int’l Criminal Court, Assembly of States Parties, Special Working Grp. on the Crime of Aggression 5th Sess., Nov. 23–Dec. 1, 2006, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, U.N. Doc. ICC-ASP/5/SWGCA/INF.1, ¶ 18 (Sept. 5, 2006), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-SWGCA-INF1_English.pdf.

58. *See id.* ¶¶ 18–20 (summarizing debates over the term “flagrant” versus “manifest”). The term “flagrant” disappeared in 2007, apparently because it was considered too high a barrier to prosecution. *See* Int’l Criminal Court, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 16–18, U.N. Doc. ICC-ASP/5/35, Annex II (2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-35_English.pdf (discussing the term “manifest”).

59. *See, e.g.*, Int’l Criminal Court, Assembly of States Parties, Special Working Grp. on the Crime of Aggression 6th Sess., Nov. 30–Dec. 14, 2007, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ¶ 57, U.N. Doc. ICC-ASP/6/SWGCA/INF.1 (July 25, 2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-SWGCA-INF-1_English.pdf (discussing debates over including reference to “war of aggression”).

60. *See, e.g.*, Preparatory Commission for the International Criminal Court, *Proposal Submitted by Germany*, U.N. Doc. PCNICC/1999/DP.13 (July 30, 1999), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/223/37/pdf/N9922337.pdf?OpenElement>.

61. Article 46 of the 1969 Vienna Convention on the Law of Treaties suggests one useful definition in connection with provisions governing treaty ratifications in violation of

referred to the degree of clarity or ambiguity surrounding the illegality of the act of aggression; to others, it denoted some level of seriousness, in terms of the impugned act's scale or consequences, or willfulness on the part of the actor;⁶² to still others, it was susceptible to both interpretations, the so-called "double function."⁶³ The definitions of "act of aggression" and "crime of aggression" were thus open to endless interpretation and were potentially quite expansive. At the same time, consensus on the text rendered them close to sacrosanct. As a result, detractors of the amendments shifted their attention to tightening the jurisdictional regime.

B. The State of Play Vis-à-Vis Jurisdiction Prior to Kampala

At the Resumed Eighth Session of the Assembly of States Parties held March 22–25, 2010 in New York, H.R.H. Prince Zeid Ra'ad Zeid al-Hussein—Jordan's Ambassador to the United States and Mexico, first president of the ICC Assembly of States Parties, Chair of the Special Working Group on the Crime of Aggression and chair of the negotiations in Kampala—circulated a "Non-Paper" in an attempt to encapsulate the outstanding issues concerning the jurisdictional conditions for the crime of aggression.⁶⁴ The text was based on the assumption, virtually constant throughout the negotiations, that all three trigger mechanisms (state, prosecutor and Security Council referrals) would apply to the crime of aggression.⁶⁵ Two sets

domestic law: "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), art. 46 [hereinafter Vienna Convention].

62. See Int'l Criminal Court, Assembly of States Parties, Official Records on its 4th Sess., Nov. 28–Dec. 3, 2005, *Discussion Paper 3, Definition of Aggression in the Context of the Statute of the ICC*, ¶ 3, U.N. Doc. ICC-ASP/4/32, Annex II.D, available at <http://www.icc-cpi.int/NR/rdonlyres/D224718C-39EF-477C-B028-F434F4BF78AE/0/Annexes.pdf> (discussing alternative interpretations of "manifest").

63. Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1193 n.55 (2010).

64. Int'l Criminal Court, Assembly of States Parties, Official Records on its Resumed 8th Sess., Mar. 22–25, 2010, *Non-Paper by the Chairman on Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction*, U.N. Doc. ICC-ASP/8/20/Add. 1, Appendix 1, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASPR8-ENG.ANNEXES.pdf. Non-papers are unofficial documents, not intended to be actionable, that aim to consolidate the negotiations and gauge support for particular formulations or concepts in an informal way.

65. *Id.* at ¶ 2.

of issues remained contentious: first, the applicable amendment governing the entry into force mechanism, which also impacted the preconditions for the exercise of jurisdiction; and second, the appropriate filter mechanisms for aggression prosecutions triggered by a state referral or the Prosecutor's exercise of his *proprio motu* powers. Given that these two issues were central to the operationalization of the crime of aggression, the possibility that the Review Conference might result in a definition-only outcome hovered in the background of the negotiations. This would have been viewed as a welcome conclusion by some participants, but as a complete failure by others, given that the definition already enjoyed considerable support going into Kampala.

1. The Debates over the Entry into Force Provisions and Jurisdictional Preconditions Before Kampala

The first contentious jurisdictional issue arose due to the interplay between Article 12 of the ICC Statute, entitled "Preconditions to the Exercise of Jurisdiction,"⁶⁶ and Article 121, entitled "Amendments."⁶⁷ The latter Article contains two separate regimes governing the entry into force of amendments to the Statute.⁶⁸ Jurisdiction over the current ICC crimes is governed by Article 12(2), which provides that absent a Security Council referral under Article 13(b),⁶⁹ the court may exercise jurisdiction over crimes committed on the territory or by the nationals of States Parties.⁷⁰ Article 12 is the product of a ma-

66. Article 12(2) of the ICC Statute, *supra* note 3, reads:

In the case of article 13, paragraph (a) or (c) [governing State Party referrals and *proprio motu* actions], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

67. ICC Statute, *supra* note 3, art. 121.

68. *See infra* text accompanying notes 67–100.

69. Pursuant to Articles 13(b) and 12(2), the Security Council can refer a situation to the court regardless of whether the state of nationality of the accused or the territorial state is a party to the Statute. ICC Statute, *supra* note 3, arts. 13(b), 12(2); *see, e.g.*, S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Darfur to the ICC).

70. The granting of non-consensual jurisdiction to the court over crimes committed on the territory of States Parties by nationals of Non-Party States has been described as "innovative, even revolutionary." *See* Diane Marie Amann, *The International Criminal*

jor compromise achieved at Rome between states advocating a pure consent-based approach to all crimes—that would have required the state of nationality of the accused to be a party to the Statute before a prosecution could go forward absent action by the Security Council⁷¹—and states advocating a form of “universal jurisdiction.”⁷² This latter approach would have enabled the court to prosecute an individual regardless of whether any of the relevant states (the state of nationality of the accused or victim, the territorial state or the custodial state) was a party to the Statute.⁷³ The default preconditions contained in Article 12 were destined to work somewhat differently with respect to the crime of aggression, given that aggression is frequently committed on the territories of both the aggressor and the victim states. That said, the very application of Article 12(2) to the crime of aggression was called into question by the provisions governing the amendment of the Statute.

Specifically, Article 121(5) governs amendments to Articles 5 (listing crimes within the jurisdiction of the court), 6 (defining geno-

Court and the Sovereign State, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 185, 198 (Ige F. Dekker & Wouter G. Werner eds., 2004).

71. The United States long argued that Article 12 of the ICC Statute which, as quoted in *supra* note 66, allows the ICC to assert jurisdiction over the national of a Non-State Party accused of committing crimes on the territory of a State Party, violates the fundamental principle of treaty law; that is, the principle that a treaty cannot “create either obligations or rights for a third State without its consent.” Vienna Convention, *supra* note 61, art. 34; see Sharon A. Williams, *Article 12, Preconditions to the Exercise of Jurisdiction*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, at 329, 336 (“In cases where the Security Council does not trigger the Court’s jurisdiction, the United States supported as fundamental the consent of the territorial State and the State of nationality of the accused person, or at a minimum only the consent of the State of nationality.”) (citations removed, emphasis in original). This argument has always been controversial and inevitably answered with the observation that the ICC does not exercise jurisdiction over states per se, but rather over individuals. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 260 (2007) (noting that a national of a third state may be subject to a treaty if on the territory of a treaty party). The crime of aggression puts the United States’s Vienna Convention argument on stronger footing given that adjudicating the crime requires the ICC to declare the illegality of a state’s actions as a predicate to the prosecution of an individual for the crime of aggression.

72. This designation was somewhat inaccurate, as universal jurisdiction generally denotes a species of domestic jurisdiction, rather than international jurisdiction. However, international jurisdiction is often conceptualized as a form of delegated jurisdiction. In this way, an international court unencumbered by jurisdictional preconditions would be analogous to a domestic court exercising universal jurisdiction. See Williams, *supra* note 71, at 332–33 (discussing German universal jurisdiction proposal).

73. Kirsch & Robinson, *supra* note 21, at 83 (discussing origins of Article 12 compromise).

cide), 7 (defining crimes against humanity) and 8 (defining war crimes).⁷⁴ It reads: “Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.”⁷⁵ All other amendments are governed by Article 121(4), which reads: “Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.”⁷⁶ The question thus presented was whether the inclusion of a definition of aggression (which was to be inserted at Article 8bis) and a dedicated jurisdictional regime (which was to be inserted at Article 15bis) were “amendments” to Articles 5 through 8 governed by sub-section (5) or more general amendments governed by sub-section (4) of Article 121. This distinction was significant because amendments under the two regimes become operational differently vis-à-vis States Parties and thus interact differently with Article 12(2)’s jurisdictional preconditions.

Under the 121(5) regime, the aggression amendments would incrementally enter into force for the purposes of state referrals and *proprio motu* prosecutions a year after the relevant States Parties ratified or accepted the amendments.⁷⁷ While it was accepted that jurisdiction would exist over a crime of aggression committed by the national of a State Party that had accepted the aggression amendments, the second sentence of Article 121(5) introduced an element of state consent. It provides: “In respect of a State Party which has not accepted the amendment, the court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.”⁷⁸ This reference to consent confused issues considerably and created uncertainty over when, if

74. ICC Statute, *supra* note 3, art. 5.

75. *Id.* art. 121(5).

76. *Id.* art. 121(4).

77. It was always understood that ratification of the amendments was irrelevant in cases in which the Security Council triggered a prosecution. Int’l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess., Nov. 14–22, 2008, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 8–10, U.N. Doc. ICC-ASP/7/20, Annex III (2008), available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-7-20-Ann.III%20English.pdf; see also Coracini, *supra* note 42, at 755 (noting that a referral by the Security Council would not depend on the consent of any of the states concerned).

78. ICC Statute, *supra* note 3, art. 121(5).

ever, jurisdiction would exist over the nationals of States Parties that had not ratified or accepted the aggression amendments.

Two competing interpretations were put forward for the language in the second sentence: the Negative Understanding and the Positive Understanding. According to the so-called Negative Understanding, if a State Party did not accept the amendments, the court could not exercise jurisdiction over aggression crimes committed in that state's territory or by that state's nationals, even if the putative victim state had accepted the aggression amendments.⁷⁹ An argument could be made that the Negative Understanding also required that the victim state accept the amendments, since the act of aggression would have been committed on its territory.⁸⁰ The Negative Understanding would also bar the prosecution of nationals of non-consenting States Parties who committed aggression on behalf of another state, for example, as mercenaries.

If the Negative Understanding governed the aggression amendments, States Parties would be able to immunize their nationals from prosecution for aggression, as well as prevent the prosecution of crimes of aggression committed in their territories, by simply not ratifying or not accepting the amendments. By contrast, the aggression provisions would apply to Non-Party States by operation of Article 12(2) to the extent either that non-party nationals committed the crime of aggression on the territory of a consenting State Party or that a crime of aggression was committed on non-party territory by the nationals of a State Party that had accepted the amendments.⁸¹ From a cynical perspective, the Negative Understanding provided an incentive for potential aggressor states to join the court, because they would be in a better position to avoid the aggression provisions through non-ratification than Non-Party States, which would not have the opportunity to reject the amendments. The Negative Understanding provided no incentive, however, for potential aggressor States Parties (or States Parties opposed to the crime of aggression)

79. See Int'l Criminal Court, Review Conference of the Rome Statute, May 31–June 11, 2010, *Conference Room Paper on the Crime of Aggression*, U.N. Doc. RC/WGCA/1, Annex III (May 25, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-WGCA-1-ENG.pdf [hereinafter May 25, 2010 Conference Room Paper] (setting forth proposed “[u]nderstandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression” for inclusion in final Resolution adopting the aggression amendments).

80. Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT'L CRIM. L. REV. 49, 85 n.148 (2011).

81. ICC Statute, *supra* note 3, art. 12(2).

to ratify or accept the aggression amendments. The aggression provisions could thus have become a dead letter if the majority of States Parties simply failed to accept or ratify them once they were adopted by the Assembly of States Parties. States opposed to the crime of aggression could limit the impact of the new aggression provisions by encouraging states to decline to adopt the amendments, thus immunizing the nationals of non-ratifying states and those territories from the ICC's jurisdiction over the crime.

By contrast, the so-called Positive Understanding of the second sentence of Article 121(5) reflected the default regime in Article 12(2) and provided that all that mattered was that the victim state had ratified or accepted the aggression amendments, regardless of whether the aggressor state was a party or had accepted the amendments.⁸² This Understanding required the text of the second sentence of Article 121(5) to be manipulated so that it could be read as an affirmative statement: if a State Party *has* accepted the amendment, then the court *can* exercise its jurisdiction over crimes of aggression committed *on its territory*. If this were the intent of the parties, of course, it would have made more sense to word it as such. By this approach, the court could exercise jurisdiction over the crime of aggression committed on the territory of any State Party that accepted the aggression amendments, regardless of whether the putative aggressor state was a State Party or had ratified or accepted the amendments. The Positive Understanding strained the text of that provision almost to the breaking point. It nonetheless received significant public support as a fallback position among negotiating states that actually favored the application of Article 121(4) to the aggression amendments, which would operationalize the crime once seven-eighths of all States Parties ratified the amendments.⁸³

The amendments would become operational more slowly, if ever, under Article 121(4) than under Article 121(5), for either interpretation. Once seven-eighths of the States Parties have accepted the amendments via instruments of ratification or acceptance, the court could begin to accept state or *proprio motu* referrals of cases involving acts of aggression committed on the territory, or by the nationals, of all States Parties pursuant to the standard operation of Article 12.⁸⁴

82. *Id.* art. 121(5).

83. Int'l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess. (1st & 2d Resumptions), Jan. 19–23, Feb. 9–13, 2009, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 31–37, U.N. Doc. ICC-ASP/7/SWGCA/2 (2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP7R2/ICC-ASP-7-SWGCA-2-ENG.pdf.

84. It was never fully clarified whether Security Council referrals could begin immediately upon adoption of the amendments; presumably the supporters of Article 121(4)

Thus, all States Parties would be equally bound by the aggression provisions once seven-eighths of the Parties (98 states given 114 States Parties as of October 12, 2010⁸⁵) accepted them, and no opt out or withholding of consent was available.

Under an Article 121(4) regime, once the aggression amendments become operational, the only way for States Parties to avoid prosecutions for acts of aggression committed on their own territory would be by withdrawing from the Statute altogether, in accordance with Articles 121(6) and 127 of the Statute.⁸⁶ Even then, withdrawing states—like other Non-Party States—would remain subject to the new aggression provisions to the extent that their nationals committed aggression on the territory of other States Parties as understood by Article 12(2). With the Article 121(4) amendment framework, an opportunity existed for obstructionist states to block the aggression provisions from entering into force altogether by preventing the necessary seven-eighths support for the new provisions. Powerful states intent on sabotaging the amendments would have to convince only fourteen or so holdouts to decline ratification or acceptance, thus rendering the amendments stillborn.

The two amendment regimes impacted Non-Party States differently, which further complicated matters. To apply the aggression amendments to Non-Party States pursuant to Article 121(4) would have been easy: once those amendments entered into force with seven-eighths ratification, the nationals of Non-Party States could be prosecuted for the crime of aggression pursuant to the standard preconditions of jurisdiction set forth in Article 12(2). Non-Party States would be in the same position as States Parties in terms of their vulnerability to aggression prosecutions of their nationals. By contrast, Article 121(5) created an anomaly whereby States Parties could exempt their nationals from the aggression provisions by simply failing to adopt or ratify the amendments.⁸⁷ The Negative Understanding in

would insist that Security Council referrals would also have to await the seven-eighths ratification.

85. See *The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Apr. 1, 2011).

86. ICC Statute, *supra* note 3, art. 121(6) (“If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.”).

87. Concerns were also expressed that newcomers that joined the Statute post-amendment would not benefit from the opt-out option and would take the Statute as they found it. Article 40(5) of the Vienna Convention on the Law of Treaties, however, suggests

particular allowed potential aggressor states to avoid the crime of aggression so long as they were already party to the Statute. Non-Party States, on the other hand, would not have any opportunity to opt out of the aggression provisions by non-ratification. Arguments were made and generally accepted that principles of non-discrimination would suggest that Non-Party States should not be worse off than States Parties vis-à-vis the amendments.⁸⁸ States argued in favor of the Negative and Positive Understandings of Article 121(5) in order to address the issue of Non-Party States in the aggression context as well.

It was clear from the provisions' wording that the more stringent Article 121(4) procedure was the default procedure, subject only to the exception set forth in Article 121(5).⁸⁹ A strong textual argument existed that the aggression amendments should be governed by Article 121(4). First, the inclusion of the crime of aggression required a new Article 8bis, which is not an amendment to Article 8 governing war crimes but rather a new provision that could not be sequentially numbered, as well as a new Article 15bis. Second, Article 121(5) seems to address the scenario whereby the ICC Statute's existing penal definitions were amended after states had already joined the treaty, thus unsettling states' established expectations about the reach of the court, whereas Article 121(4) addresses the other amendments to other aspects of the ICC Statute. By this logic, the addition of a new crime altogether should involve Article 121(4) and require a high degree of state support before the new crime may become prosecutable.

that newcomers may be given the option of acceding to the original version of the treaty rather than the amended version:

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Vienna Convention, *supra* note 61, art. 40(5).

88. See Int'l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess. (1st & 2d Resumptions), Jan. 19–23, Feb. 9–13, 2009, *Report of the Special Working Group on the Crime of Aggression*, ¶ 28 (2009), U.N. Doc. ICC-ASP/7/20/Add.1, 2d Resumption, Annex II, available at http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-20-Add.1%20English.pdf (discussing equal treatment of Non-Party States); see also Coracini, *supra* note 42, at 760 (noting the “previously determined policy consideration to treat non-State Parties and States Parties [that do not accept] the amendment equally”).

89. See *supra* text accompanying notes 75–76.

On the other hand, the legislative history of the ICC Statute somewhat favored considering Article 121(5) as the *lex specialis* for any amendments to the substantive criminal provisions.⁹⁰ Until well into the 1998 Rome Conference, the definitions of all the crimes had been contained in Article 5; this suggested that adding the crime of aggression would have necessitated an amendment to Article 5 as understood by Article 121(5). It was only late in the negotiations that the Drafting Committee disaggregated Article 5 and gave each of the three crimes its own dedicated treaty provision.⁹¹ The amendment procedures were negotiated and drafted by a different committee, and the last minute change to Article 5 was not reflected in the amendment provisions. As a result, the amendment provisions do not cleanly track the ultimate structure of the treaty provisions outlining the court's substantive crimes.⁹²

Besides the arguments that viewed the two amendment regimes as mutually exclusive,⁹³ less compelling arguments posited that neither amendment regime was applicable.⁹⁴ Some states put forth the view that Article 5(2) of the Statute, which contemplates the inclusion of a definition of aggression, refers to the adoption of a "provision" rather than "amendment."⁹⁵ By this argument, the inclusion of a definition of the crime of aggression would not require ratification by States Parties as would an "amendment" in the sense of

90. See Gaja, *supra* note 20, at 440 (assuming applicability of Article 121(5) to aggression); Trahan, *supra* note 80, at 85 n.148 (noting that Article 121(5) was appropriate to amend the Court's core crimes).

91. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, *reprinted in* INTERNATIONAL CRIMINAL COURT: COMPILATION OF UNITED NATIONS DOCUMENTS AND DRAFT ICC STATUTE BEFORE THE DIPLOMATIC CONFERENCE 7, 12–26 (M. Cherif Bassiouni ed., 1998) (reproducing an earlier version of Article 5, which contained draft definitions of the three core crimes plus aggression and terrorism). Indeed, the version of Article 121(5) in the Statute adopted at Rome erroneously referred only to amendments to Article 5 of the Statute. The final report, however, added reference to Articles 6 through 8. See Roger S. Clark, *Article 121: Amendments*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 16, at 1265, 1269–70.

92. Lietzau, *supra* note 40, at 132.

93. See Robert Manson, *Identifying the Rough Edges of the Kampala Compromise*, 21 CRIM. L.F. 417, 422 (2010) (arguing that the Statute provides for "two separate, distinct and mutually exclusive mechanisms, for the acceptance and subsequent entry into force of the Statute.").

94. Kreß & von Holtzendorff, *supra* note 63, at 1196–99 (discussing various interpretations of the amendment provisions).

95. See *supra* note 18.

Article 121(4) or (5), because the new text would simply complete the job that had been left unfinished at Rome.⁹⁶ This argument would have dodged the question of which sub-paragraph of Article 121 applied and rendered the aggression provisions immediately operational once they were adopted by the Assembly of States Parties at the Review Conference. It seems highly unlikely, however, that the delegates participating in the Rome Conference would have written such a blank check to their successors, especially given the controversy surrounding the crime of aggression. An alternative position advanced was that the aggression amendments should enter into force pursuant to a complex combination of the two amendment schemes.⁹⁷ In particular, it was suggested that the definition of aggression and related amendments such as the leadership clause in Article 25 would become operational pursuant to Article 121(5), and that Article 121(4) would govern the jurisdictional amendments.⁹⁸ Although several disaggregated proposals were put forth in Kampala, in the end, the Assembly proceeded on the understanding that one amendment regime or the other should apply to the entire package to ensure the unity of the amendments. Remarkably, the question of which amendment regime would govern the addition of the crime of aggression was not resolved or even appreciably considered by the end of the Rome Conference. This occurred in part because the final package—which contained the aggression compromise and the amendment provisions—pulled together the work of different working groups and was presented in a “take-it-or-leave-it” fashion to states in the final hours of the Rome Conference.⁹⁹ This amendment conundrum had received some attention at prior sessions of the Special Working Group on the Crime of Aggression and the Assembly of States Parties, but there was no consensus on exactly how it should be resolved.¹⁰⁰ And so, the operative amendment process remained an open—if at the time peripheral—issue leading up to Kampala.

96. June 2005 SWGCA Report, *supra* note 20, ¶¶ 14–15.

97. See Trahan, *supra* note 80, at 65 (noting that such a system would be “hopelessly complex”).

98. See Stefan Barriga & Leena Grover, *Negotiating the Kampala Compromise on the Crime of Aggression* (unpublished manuscript) (on file with the author) (noting that the ABS Proposal applied both 121(4) and (5) to different provisions of the proposal).

99. June 2005 SWGCA Report, *supra* note 20, ¶ 5 (noting that aggression had been incorporated in Article 5 at a late phase after the completion of the negotiations and drafting of Article 121).

100. See, e.g., Int’l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess., Nov. 14–22, 2008, *Report of the Special Working Group on the Crime of Aggression* (2008), U.N. Doc. ICC-ASP/7/20, Annex III, available at <http://www.icc-cpi.int>

2. The Debates over Jurisdictional Filters Pre-Kampala

The second major contentious issue contained in the Chair's Non-Paper issued shortly before the Kampala Conference concerned the appropriate jurisdictional filters for state referrals or *proprio motu* investigations involving the crime of aggression. Since the early days of the aggression negotiations, it was posited as a matter of policy that the court should be subject to some mechanism that would allow the prosecution of individuals only following a prior determination that the state in question had committed an act of aggression. The International Law Commission originally designated the Security Council as the entity that would serve this filtering function,¹⁰¹ a role that was under consideration in Rome.¹⁰² Later, states proposed more filter options for consideration, even though not all states agreed on the need for any filter at all.¹⁰³ The P-5 and several other states favored the ILC approach designating the Security Council as an exclusive and determinative filter. Under this system—in the absence of a prior Security Council determination that the state in question had committed an act of aggression, prosecution would be barred. This approach would have required the Council not only to muster the necessary majority but also to gain the affirmative vote or abstention of the P-5.¹⁰⁴ If the Security Council did not make the

/iccdocs/asp_docs/SWGCA/ICC-ASP-7-20-Ann.III%20English.pdf (recounting negotiations over the correct interpretation and application of Article 121). Article 119 of the ICC Statute, *supra* note 3, allows the Assembly of States Parties to refer to the International Court of Justice disputes over the interpretation or application of the Statute that cannot be resolved by negotiation; however, this option, which would have delayed the addition of the aggression provisions even more, was never seriously considered.

101. See, e.g., Draft Statute for an International Criminal Court, art. 23(2), U.N. Doc. A/CN.4/Ser. A/1994/Add. 1 (pt. 2), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf (“A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.”).

102. See, e.g., Report of the Preparatory Committee on the Establishment of an International Criminal Court, art. 10, reprinted in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 119, 132–33 (M. Cherif Bassiouni ed., 1998) (contemplating a filter role for the Security Council for the crime of aggression).

103. See, e.g., June 2005 SWGCA Report, *supra* note 20, ¶¶ 63–74.

104. See U.N. Charter art. 27, ¶ 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”); see also Constantin A. Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members*

necessary determination, no aggression charges could be brought, although the Prosecution could investigate other ICC crimes committed within the same situation. This approach was premised on the underlying argument that the Council enjoys the primary, if not exclusive, role of addressing threats to and breaches of the peace in the UN Charter system.¹⁰⁵

Two forms of a Security Council filter were under consideration during the drafting negotiations. One form of filter was premised on the Council's making an express determination that a state had committed an act of aggression. The second filter, the so-called "green light option," would have allowed the Council to approve a prosecution through adoption of a Chapter VII resolution requesting the Prosecutor to proceed but would not have necessitated an affirmative aggression determination by the Council.¹⁰⁶ Some proponents of Security Council control over aggression prosecutions argued that the Charter required that the court only be empowered to proceed on the basis of an express determination by the Council and that the green light option undermined this mandate.¹⁰⁷ There was some question about whether the veto should apply to a green light resolution, although it was clear that members of the P-5 would not easily relinquish their veto rights in the aggression context.¹⁰⁸ Proponents of the

of the Security Council Under Article 27(3), 61 AM. J. INT'L L. 737, 742-47 (1967) (describing the established practice of the Security Council to treat a voluntary abstention as not tantamount to a veto).

105. See, e.g., Int'l Criminal Court, Assembly of States Parties, Special Working Grp. on the Crime of Aggression, 6th Sess., Nov. 30-Dec. 14, 2007, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, U.N. Doc. ICC-ASP/6/SWGCA/INF.1, ¶ 25 (July 25, 2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-SWGCA-INF-1_English.pdf.

106. See Int'l Criminal Court, Assembly of States Parties, 6th Sess., Nov. 30-Dec. 14, 2007, *Report of the Special Working Group on the Crime of Aggression*, U.N. Doc. ICC-ASP/6/SWGCA/1, ¶ 35 (Dec. 13, 2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-SWGCA-1_English.pdf (discussing Chairman's formulation of the green light proposal).

107. See *infra* text accompanying notes 207-210 (articulating the exclusivity thesis).

108. It could be argued that a resolution simply allowing the prosecutor to proceed would constitute a procedural decision subject to Article 27, paragraph 2 of the UN Charter and thus be exempt from the veto. See U.N. Charter art. 27, para. 2 ("Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members."). If this interpretation were adopted, nine of fifteen Council members could give the approval for a prosecution to go forward without the support of the P-5. The express determination process, by contrast, is more clearly in the nature of a substantive decision. Making such a determination would require the concurrence (by positive vote or abstention) of the permanent five. That said, an argument could be made that both processes are

idea viewed the green light option as giving the Council greater flexibility in responding to threats to the peace, in that the Council could allow a prosecution to go forward without being locked into an aggression determination.¹⁰⁹

Opponents of an exclusive role for the Security Council proposed alternative or back-up filter mechanisms in the event that the Council failed, or was unable, to make the necessary aggression determination. These alternative filters were designed to ensure that Security Council inaction would not necessarily be fatal to an investigation into potential crimes of aggression. Candidates for this back-up filter included the General Assembly, the International Court of Justice (ICJ) and the court itself, although the precise details on how these alternative entities would make such a determination remained to be worked out.¹¹⁰ Beyond these alternative filters, several delega-

sufficiently substantive to be subject to the veto, especially in light of the fact that both the Article 13(b) referral and the Article 16 deferral processes are subject to the veto as well. In any case, the veto is the default procedure within Article 27, paragraph 3, which applies to “all other matters.” Conceptualizing one route to an aggression prosecution that was exempt from the veto may have placated states that opposed Security Council control over aggression prosecutions and rendered them more willing to accept an exclusive Security Council filter. Nonetheless, allowing a route to prosecution that circumvented the veto would also have potentially subjected nationals of the P-5 to prosecution, which was of course problematic from the P-5’s perspective. Ultimately, it would have been for the Council to determine whether the green light option was considered a procedural or a substantive decision. By past practice, the decision regarding the preliminary question as to whether or not a matter is procedural is treated as a substantive one and is subject to the veto, which gives rise to the potential for the rarely used but ever-present “double veto.” See Frederic L. Kirgis, Jr., *The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506, 510 (1995).

109. See Int’l Criminal Court, Assembly of States Parties, 6th Sess., Nov. 30–Dec. 14, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶ 38, U.N. Doc. ICC-ASP/6/SWGCA/1 (Dec. 13, 2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-SWGCA-1_English.pdf. It seems clear that the green light option was a favorite of the Chair of the Special Working Group on the Crime of Aggression. Although the green light option received little actual support over the years of negotiations, it nonetheless remained in the draft texts under consideration. *Id.* ¶ 36 (noting that the green light proposal received “limited support”); see also Robert Schaeffer, *The Audacity of Compromise: The UN Security Council and the Pre-Conditions to the Exercise of Jurisdiction by the International Criminal Court with Regard to the Crime of Aggression*, 9 INT’L CRIM. L. REV. 411, 418 (2009) (concluding that the Chair was a proponent of the proposal).

110. See, e.g., Int’l Criminal Court, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 23–41, U.N. Doc. ICC-ASP/5/35, Annex II (2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-35_English.pdf (discussing filter options); see also *infra* text accompanying notes 259–62.

tions advanced two more permissive options: first, no filter whatsoever; and second, no back-up filter in the event of Security Council inaction.¹¹¹ Although earlier drafts had suggested otherwise,¹¹² it was eventually decided that basic principles of due process demanded that the ICC would not be bound by any determination on aggression by any outside entity.¹¹³ This was to ensure the independence of the court, the right of the accused to mount a full defense on every element of the crime and maintenance of the burden of proof on the prosecution.¹¹⁴

In connection with proposals for a non-exclusive filter, Belgium proposed a “red light” function that would have empowered the Council to stop an aggression investigation or prosecution from going forward altogether.¹¹⁵ It was hoped that this function would placate the Security Council by providing it with both a more robust and more flexible power than the Council’s existing deferral power under Article 16 of the ICC Statute.¹¹⁶ This is because Article 16 appears to require the deferral of an entire case,¹¹⁷ and not just particular charges, and it only operates for a year subject to renewal. Although

111. Int’l Criminal Court, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶ 25, U.N. Doc. ICC-ASP/5/35, Annex II (2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-35_English.pdf.

112. See U.N. G.A. Rep. of the Ad Hoc Comm. on the Establishment of the Int’l Criminal Court, paras. 69–71, U.N. Doc. A/50/22; GAOR, 50th Sess., Supp. No. 22 (Sept. 6, 1995), available at <http://www.undemocracy.com/A-50-22.pdf> (discussing debates).

113. See June 2005 SWGCA Report, *supra* note 20, ¶ 71 (“Concerns regarding the exclusive competence were also based on the fact that permanent members of the Security Council could veto a proposed determination that an act of aggression had occurred and thus block criminal investigation and prosecution. Since aggression was a leadership crime, this could jeopardize the principle that all accused had similar legal resources at their disposal, irrespective of their nationality.”).

114. The final iteration of this principle reads, “A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.” Aggression Resolution, *supra* note 1, Annex I, art. 15bis(9); see June 2005 SWGCA Report, *supra* note 20, ¶ 61 (confirming consensus that any Security Council determination would not be binding).

115. See Int’l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess., Nov. 14–22, 2008, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 21–23 (Mar 13, 2008), U.N. Doc. ICC-ASP/7/20, Annex III, available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-7-20-Ann.III%20English.pdf.

116. See *infra* text accompanying notes 269–273.

117. See *supra* note 26.

the red light function had been contemplated by the time of the Review Conference, it had not yet appeared in any consolidated text.¹¹⁸

3. State Preferences on the Eve of Kampala

At the close of the Resumed Eighth Session of the Assembly of States Parties in March 2010, the Chair of the Working Group on the Crime of Aggression invited States Parties to participate in an informal straw poll to express their preferences on the ideal balance between state consent, Security Council power and judicial independence in the proposed aggression amendments. It referred to several combinations of the various filter and amendment options. The Chair organized these options into four boxes displayed graphically below.

Box 1 required not only the acceptance of the aggression amendments by the aggressor state or states as a jurisdictional precondition, but also a Security Council filter for any aggression charges. This option could be implemented through the Negative Understanding of Article 121(5), which would require that the aggressor state had ratified or adopted the amendments before any prosecution could proceed. Box 2 required only the Security Council filter; the acceptance of the aggression amendments by the victim state was sufficient as a precondition to jurisdiction by operation of Article 12(2).¹¹⁹ This option could be implemented by either the Positive Understanding of Article 121(5) or entry into force pursuant to Article 121(4). Box 3 required acceptance of the aggression amendments by the putative aggressor state(s) as a precondition to jurisdiction but contemplated a non-exclusive Security Council filter; that is, either no filter at all or one or more alternative filters. Box 3 was premised on the Negative Understanding of Article 121(5). Box 4 did not require consent of the putative aggressor state(s), thus implicating Article 121(4), and envisioned no filter or a non-exclusive Security Council filter.¹²⁰

118. See Int'l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess. (1st & 2d Resumptions), Jan. 19–23, Feb. 9–13, 2009, *Report of the Special Working Group on the Crime of Aggression*, App. I (2009), U.N. Doc. ICC-ASP/7/20/Add.1, 2d Resumption, Annex II, available at http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-20-Add.1%20English.pdf.

119. See *supra* text accompanying note 70.

120. These were informal compilations and were never published. See Int'l Criminal Court, Assembly of States Parties, Official Records on its Resumed 8th Sess., Mar. 22–25, 2010, *Report of the Working Group on the Review Conference* (discussing the options), U.N. Doc. ICC-ASP/8/20/Add.1, Annex II, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASPR8-ENG.ANNEXES.pdf.

Straw Poll Results				
	Box 1	Box 2	Box 3	Box 4
Element	Consent by Aggressor State Necessary; Exclusive Security Council Filter for State Referrals and <i>Proprio Motu</i> Investigations	No Necessity of Aggressor State Consent; Exclusive Security Council Filter for State Referrals and <i>Proprio Motu</i> Investigations	Consent of the Aggressor State Necessary; No Exclusive Security Council Filter for State Referrals and <i>Proprio Motu</i> Investigations	Neither Consent Nor Exclusive Security Council Filter for State Referrals and <i>Proprio Motu</i> Investigations
Approximate Number of Supportive States	11	2	23	32

In the informal vote,¹²¹ participating States Parties showed the most support for Box 4 (thirty-two states), followed by Box 3 (twenty-three states) and Box 1 (eleven states). Only two States Parties indicated a preference for Box 2. States were evenly split on whether the consent of the aggressor state should be required (combining Boxes 1 and 3 and Boxes 2 and 4 both yielded thirty-four states).

121. See *id.* at 42, 44 (discussing roll call); Int'l Criminal Court, Assembly of States Parties, Official Records on its Resumed 8th Sess., Mar. 22–25, 2010, *Non-Paper by the Chairman on Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction*, U.N. Doc. ICC-ASP/8/20/Add.1, Annex II, Appendix I (setting forth chart), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASPR8-ENG.ANNEXES.pdf. Other commentators report slightly different tallies of this informal vote. See Trahan, *supra* note 80, at 63; see also Barriga & Grover, *supra* note 98, at 6 n.14 (listing countries voting in favor of and against a consent-based regime).

Combining Boxes 3 and 4 revealed that a strong majority of States Parties (fifty-five) favored no exclusive Security Council filter, although thirteen states disagreed. The fundamental debate was this: Did states want a consent-based regime (Boxes 1 and 3), a system controlled by the Security Council (Boxes 1 and 2) or a Court with expansive jurisdiction over the crime (Box 4)? The negotiations in Kampala became an effort to “think outside the box” in order to bridge these disparate and seemingly intractable positions.¹²²

C. The Foundation for Negotiations in Kampala

On the eve of the Kampala Review Conference, the Chair of the Working Group on the Crime of Aggression submitted a Conference Room Paper setting forth a proposed draft outcome for the Review Conference with “a view toward completing the remaining work” on the crime of aggression.¹²³ The Paper was accompanied by a new Non-Paper, this one discussing “Further Elements for a Solution on the Crime of Aggression.”¹²⁴ The Conference Room Paper, which did not endeavor to advance the negotiations from the close of the final preparatory sessions, contained the necessary components that, once finalized, would make the crime of aggression capable of immediate operationalization: a definition of the crime and proposed elements, a jurisdictional regime, an enabling resolution and interpretive understandings.¹²⁵

Although the Conference Room Paper contained the seeds of a complete package, the text addressing the two main obstacles to consensus remained in brackets and reflected all four boxes from the straw poll. First, three broad filter options remained under consideration: an exclusive and determinative Security Council filter (Alternative 1); an exclusive but not determinative Security Council filter (Alternative 2, Option 1); and a menu of alternative fallback filters that would operate in the absence of Security Council action (Alter-

122. Wenaweser, *supra* note 51, at 884 (noting that delegations remained firm in their positions on the eve of the Kampala Conference).

123. See May 25, 2010 Conference Room Paper, *supra* note 79.

124. Int’l Criminal Court, Review Conference of the Rome Statute, May 31–June 11, 2010, *Non-Paper by the Chair: Further Elements for a Solution on the Crime of Aggression*, U.N. Doc. RC/WGCA/2 (May 25, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-WGCA-2-ENG.pdf [hereinafter May 25, 2010 Non-Paper].

125. See May 25, 2010 Conference Room Paper, *supra* note 79.

native 2, Options 2–4).¹²⁶ The candidate entities for exercising these alternative filters remained the ICC Pre-Trial Chamber (Option 2), the UN General Assembly (Option 3) and the International Court of Justice (Option 4). The Security Council filter appeared in two forms: the first requiring an express determination of aggression (Article 15bis(3)) and the second espousing the “green light option” (Alternative 1, Option 2). This Conference Room Paper did not put forward a red light function for the Council.¹²⁷

The second bracketed issue within the Conference Room Paper concerned the entry into force mechanism for the aggression amendments, reflecting the longstanding debate over the applicability of Article 121(4) versus (5). In this regard, the Conference Room Paper put forward the two competing interpretations of the second sentence of Article 121(5) as interpretive “understandings” in an Annex. Under the first interpretation (Alternative 1, the so-called Posi-

126. Proposed Article 15bis read as follows:

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,
 - Option 1 – end the paragraph here.
 - Option 2 – add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.
4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,
 - Option 1 – end the paragraph here.
 - Option 2 – add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;
 - Option 3 – add: provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;
 - Option 4 – add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.

Id. at 4–5.

127. *Id.*

tive Understanding), jurisdiction *would exist* over acts of aggression committed *against* a State Party that had accepted the aggression amendments (regardless of whether the aggressor state(s) was a party or had accepted the amendments). Under the second interpretation (Alternative 2, the so-called Negative Understanding), jurisdiction *would not exist* over acts of aggression committed by *any state* that had not accepted the amendments, whether party or non-party.¹²⁸ The Chair's formulation of the Negative Understanding in the Conference Room Paper thus covered both States Parties and Non-Party States, even though the application to the latter was not obvious from the plain text of Article 121(5). As noted,¹²⁹ this adaptation reflected the generally accepted view that Non-Party States should not be worse off vis-à-vis the aggression amendments than States Parties that declined to ratify the new provisions.

Other understandings in the Annex of the Conference Room Paper flagged a few additional open issues. One was the question of when the Security Council could start referring cases, with the options being, first, upon adoption of the amendments or second, upon entry into force of the amendments.¹³⁰ The latter depended on the choice between Article 121(4) and (5); entry into force under the former would have a longer time horizon by requiring seven-eighths ratification, whereas under the latter, the provisions could become operational vis-à-vis the Council upon a single ratification plus one year. The Non-Paper suggested that notwithstanding the provisions' rapid entry into force under Article 121(5), the court's ability to assert jurisdiction over the crime of aggression could be further delayed for a period of years.¹³¹ Proposed understandings on temporal jurisdiction only gave the court jurisdiction over acts of aggression committed after either the adoption of the amendments or their entry into force, in the alternative.¹³² These understandings did little to clarify when an act of aggression is deemed to have been committed¹³³ or whether an act of aggression that leads to a full-blown armed conflict might be considered a continuing crime.¹³⁴ The Conference Room

128. *Id.* at 7.

129. *See supra* text accompanying note 88.

130. May 25, 2010 Conference Room Paper, *supra* note 79, at 7.

131. May 25, 2010 Non-Paper, *supra* note 124, at 1.

132. May 25, 2010 Conference Room Paper, *supra* note 79, at 7.

133. *Id.* at 3 (where Article 8bis(1) includes the planning and preparation of an act of aggression as a punishable *actus reus* of the crime).

134. In the final package, Understanding 3 states that:

Paper also suggested a potential review clause that would allow for the subsequent reconsideration of the jurisdictional regime,¹³⁵ ostensibly included in order to “accommodate the concerns of delegations that have shown flexibility in their position.”¹³⁶

D. The Arc of the Kampala Negotiations

The May 25, 2010 Papers served as the basis for the first plenary session of the Working Group on the Crime of Aggression of the Kampala Review Conference.¹³⁷ The general debate was held on Friday, June 4, 2010. Early at this session, Brazil orally introduced its own proposal, apparently the subject of consultations during the weeks leading up to Kampala. It was endorsed by Argentina and Switzerland, thus earning the moniker the “ABS Proposal.”¹³⁸ According to the Brazilian delegate, the ABS Proposal identified two elements from all four boxes of the straw poll that received widespread and possibly consensual support: first, the definition of the crime; and second, the power of the Security Council to refer situations involving acts of aggression for prosecution. These provisions, it was argued, should enter into force immediately pursuant to Article 121(5), thus responding to the preferences of states in Boxes 1 and 2. The ABS group proposed inserting these provisions into Article 5 of the ICC Statute, signaling an intent to be consistent with Article 121(5), which governs amendments to that article.

Brazil recognized that other aspects of the aggression package, particularly referrals by States Parties and *proprio motu* investigations, were more controversial and thus might be subject to differ-

It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Aggression Resolution, *supra* note 1, at 22.

135. May 25, 2010 Conference Room Paper, *supra* note 79, at 2 n.3.

136. May 25, 2010 Non-Paper, *supra* note 124, at 1. Notably, this proposed review clause would have allowed a reconsideration of the jurisdictional regime only, as opposed to the definition of the crime, which—while unbracketed—still did not enjoy universal support.

137. For another insider account, see Wenaweser, *supra* note 51.

138. Non-Paper Submitted by Argentina, Brazil and Switzerland as of June 6, 2010 (on file with the author). Many of the texts circulated in Kampala are untitled, undated, and unattributed. I have provided as much detail as possible to identify the particular text. See Wenaweser, *supra* note 51, at 885 (describing ABS proposal); Kreß & von Holtzendorff, *supra* note 63, at 1202–03 (also describing the ABS proposal).

ent treatment. Under the ABS Proposal, these other aggression triggers would become operational at a later stage—after seven-eighths ratification pursuant to Article 121(4)—and be subject to an internal filter by the Pre-Trial Chamber in accordance with Boxes 3 and 4. These other provisions were to be inserted in a new Article 15bis. Brazil thus proposed that different parts of the aggression provisions be subject to different amendment regimes.¹³⁹ The theory was that this sequential approach would allow time for the court to mature institutionally and gain experience with aggression prosecutions under the supervision of the Security Council while ensuring that the more controversial trigger mechanisms became operational only after the aggression amendments enjoyed a high level of state support as manifested by the seven-eighths ratification. The goal was thus to merge aspects of all four Boxes into a single proposal that would over time lead the court toward Box 4.

By the time of the June 4 plenary, most delegations had not formulated a position on the ABS Proposal, or even seen a draft text for that matter, and so despite expressing interest and gratitude for Brazil's contribution to the debate, no strong support was given. Japan spoke forcefully against the ABS Proposal, however, saying that any final package must be legally proper and not just politically expedient. The Japanese delegate argued that while flexibility was appropriate on issues of policy, there were limits where legal interpretations were at issue, especially in the penal context. He reminded delegates that they were forging the aggression amendments within the framework of a pre-existing penal regime and were not in a position to rewrite the treaty. The treaty, he argued, envisioned two mutually exclusive amendment regimes. Any amendments had to be adopted according to the appropriate amendment clause—Article 121(5) and the Negative Understanding in his view—and not piecemeal pursuant to one or another clause as convenient, no matter how laudable the intentions. In his estimation, the ABS Proposal was viable only if Article 121 were amended.¹⁴⁰ Japan urged delegates to

139. See Coracini, *supra* note 42, at 758 (noting that the ABS Proposal remained “faithful to the entry into force mechanisms foreseen in Article 121 (4) and (5).”).

140. Echoing something suggested by Switzerland, Japan in its next intervention raised the question of whether it would be possible to amend the amendment procedures pursuant to Article 121(4) and then have the aggression amendments enter into force either simultaneously or consecutively with those amendments. See Kreß & von Holtendorff, *supra* note 63, at 1212 (describing Japanese intervention). Several weeks after the Review Conference, Japan circulated a Non-Paper reiterating its concerns about the legality of the amendment procedures and the need for legal clarity in the penal context. See Non-Paper on the Crime of Aggression (on file with the author).

produce a principled outcome in Kampala that could be justified to both domestic and international audiences. To some applause, rare in such settings, Japan closed with the caution that proceeding otherwise would risk undermining the credibility of both the ICC Statute and the system of international criminal justice. Denmark and Belgium later associated themselves with the Japanese intervention.¹⁴¹

After a day's worth of interventions on the original Conference Room Paper and alternative proposals, the Chair released the next Conference Room Paper late in the day on June 5, 2010.¹⁴² Re-

141. Several interventions later, Slovenia orally introduced an alternative but derivative proposal that it explained was based on the calculation that the non-Security Council filters would take too long to become fully operational under the ABS Proposal. The Slovenian Proposal thus added a third, interim stage during which time the court could entertain State Party and *proprio motu* referrals involving States Parties that had accepted the aggression amendments. Thus, in phase one, Security Council referrals could proceed against the nationals of any state. Once a certain number of states had ratified the amendments (the number thirty was suggested), aggression prosecutions could go forward according to the two other trigger mechanisms on the basis of reciprocity, so long as all the relevant states (the victim and aggressor state(s)) had accepted the aggression amendments. Once seven-eighths of all States Parties had ratified or accepted the aggression amendments, all trigger mechanisms would become fully operational in phase three, and the aggression provisions would apply equally to all Party and Non-Party States. Like the ABS Proposal, this package envisioned an evolutionary process whereby the aggression regime would begin under the control of the Security Council (a modified Box 2) but end with a form of universal jurisdiction over the crime once a high number of States Parties had accepted the amendments (Box 4). Both the ABS and Slovenian Proposals largely ignored the second sentence of Article 121(5) and the debate over the Positive and Negative Understandings. See Amendment on the Crime of Aggression—Adoption in Accordance with the Article 121 (on file with the author). Later, Slovenia disseminated a second Non-Paper, which built on the ideas of consent and reciprocity already circulating among the delegations while retaining a strong role for the Security Council as desired by the proponents of Boxes 1 and 2. See Non-Paper by Slovenia (June 8, 2010) (on file with the author). According to this scheme, the court would exercise jurisdiction over the crime of aggression on the basis of a Security Council referral immediately. Where “all State Parties concerned with the alleged crime of aggression have deposited instruments of ratification or acceptance of the amendment on the crime of aggression,” the other triggers would be operational. *Id.* art. 15bis(4). In the event that not all concerned states had ratified the aggression amendments, the Prosecutor would have to go back to the Security Council and “readdress the possibility of the Security Council referral in accordance with Article 13(b) with the Secretary-General of the United Nations.” *Id.* art. 15bis(4bis). Neither Slovenian proposal received much traction among delegations. See Trahan, *supra* note 80, at 72 (noting that the Slovenian proposal “did not appear to significantly alter the mix.”).

142. The Chair reissued this Paper on June 6, 2010 after fixing several errors. Int’l Crim. Ct., Review Conference of the Rome Statute, May 31–June 11, 2010, *Conference Room Paper on the Crime of Aggression* (June 6, 2010), U.N. Doc. No. RC/WGCA/1/Rev.1, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-WGCA-1-Rev.1-ENG.pdf [hereinafter June 6, 2010 Conference Room Paper].

flecting the clear but at times reluctant preference of delegations, the Paper eliminated all but two filter alternatives. The remaining contenders were—first, Alternative 1, an exclusive Security Council filter (with the green light option relegated to a footnote¹⁴³) and second, Alternative 2, an internal judicial filter in the Pre-Trial Chamber, with the option of requiring an *en banc* ruling¹⁴⁴ or an automatic appeals process.¹⁴⁵ This was despite the fact that some States Parties had spoken in favor of a General Assembly and International Court of Justice filter (denominated Article 15bis(4)(Alternative 2)(Options 3 and 4)), and very few states outside of the P-5 had spoken in favor of an exclusive Security Council filter.¹⁴⁶ This Paper also eliminated the possibility of no filter at all (styled Alternative 2, Option 1 in the prior Conference Room Paper). Absent a surge of negative feedback, it was inevitable that the crime of aggression would be subject to some filter, either the Security Council acting alone or subject to a backup filter in the form of the Pre-Trial Chamber.

In the subsequent and last plenary session of the Working Group on the Crime of Aggression held on June 7, 2010, delegations expressed support for the Chair's changes. But the ABS Proposal also began to show some traction. In particular, delegations maintained that the two-tiered sequential approach of the ABS Proposal respected the primary though not exclusive role for the Security

143. *Id.* at 3.

144. In the deliberations, other procedural enhancements to the Pre-Trial Chamber filter were discussed, such as a unanimity requirement and amendments to Article 36 that would mandate the appointment of judges with expertise in public international law and require that such judges be assigned to make aggression determinations. Although this was never formally proposed, delegations might also have considered raising the operative burden of proof before the Pre-Trial Chamber to parallel that required to issue an arrest warrant or confirm an indictment. See ICC Statute, *supra* note 3, art. 58(1)(a) (requiring proof that “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” prior to the issuance of an arrest warrant); *id.* art. 61(5) (requiring “the Prosecutor [to] support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”).

145. June 6, 2010 Conference Room Paper, *supra* note 142, at 3. Guaranteeing a right of appeal would ensure that seven judges—at least four from the Pre-Trial Chamber (composed of a minimum of six judges) sitting *en banc* and three from the Appeals Chamber (composed of five judges, including the President of the Court)—had determined that a state had committed an act of aggression and approved the decision to go forward with an aggression prosecution. There was little discussion about what would happen in the event of a “tie” vote in the Pre-Trial Division. Presumably, the vote of the President of the Division would be determinative.

146. See Coracini, *supra* note 42, at 757 (discussing gradual loss of support of alternative external filters).

Council in aggression prosecutions while ensuring the possibility of supervised prosecutions that did not enjoy Security Council approval. Advocates also argued that the long entry into force process would provide comfort to those states concerned about relinquishing Security Council control over the crime of aggression.¹⁴⁷ Most of the disapproval of the ABS Proposal mirrored Japan's legalistic intervention, criticizing the Proposal's reliance upon alternative and mutually incompatible amendment procedures for different components of the aggression amendments.¹⁴⁸

On the evening of June 7, the Chair introduced a new Conference Room Paper.¹⁴⁹ Although the text did not refer to the ABS Proposal, the impact of these schemes on the new package was immediately clear.¹⁵⁰ In particular, the Chair's Paper shifted the attention from filters to triggers, contemplated differential tracks for Security Council- and non-Security Council-triggered prosecutions and envisioned sequential activation of different aspects of the aggression regime.¹⁵¹ Thus, according to proposed Article 15bis of this Paper, state referrals and *proprio motu* investigations would be subject to a preliminary Security Council filter. Alternative 1, the exclusive Security Council filter, and Alternative 2, allowing for an enhanced Pre-Trial Chamber filter in the absence of Security Council action (either an express determination or a green light to go forward), remained bracketed.

A new proposed Article 15ter governed Security Council referrals, which were subjected to an exclusive Security Council filter. At first glance, it seemed incongruous to imagine that the Council would refer a situation and then exercise its filter power to prevent an aggression prosecution from going forward. The idea was, however, that the Council would refer situations, or crime bases, rather than particular crimes or defendants. Once the Prosecutor determined that aggression charges might be warranted, the Prosecutor would be obliged to consult the Council to allow the filter function to work and

147. See *id.* at 760 (noting that delayed entry into force would give states time to become familiar with the new provisions).

148. See David Scheffer, *The Complex Crime of Aggression Under the Rome Statute*, 23 LEIDEN J. INT'L L. 897, 903 (2010) (arguing that the activation provisions were "radical[ly]" tinkered with and probably merited an amendment to the amendment procedures).

149. Conference Room Paper on the Crime of Aggression (June 7, 2010) (on file with author) [hereinafter June 7, 2010 Conference Room Paper].

150. Barriga & Grover, *supra* note 98, at 7 ("For the chief negotiators, the ABS proposal was extremely useful.").

151. June 7, 2010 Conference Room Paper, *supra* note 149, at 4–5.

launch a formal aggression investigation. If the Council determined that an aggression prosecution was unwarranted for whatever reason, it could block those charges from going forward by declining to make an aggression determination. Other potential charges of war crimes, crimes against humanity or genocide could proceed unless the Council implemented a broader deferral under Article 16. In the event of a Council determination of aggression, or alternatively a green light Council resolution, the aggression charges could go forward alongside any other applicable charges.¹⁵²

On June 9, the ABS Proposal proponents and Canada¹⁵³ prepared a joint submission¹⁵⁴ that would have made the state party and *proprio motu* referral powers operational five years after the entry into force of the aggression amendments for any state party.¹⁵⁵ Both types of referrals would be subject to a preliminary Security Council

152. In terms of entry into force, the Chair's draft for the first and only time proposed that the amendments to Article 15 might enter into force pursuant to Article 121(4) and the seven-eighths rule. *Id.* at 1. He also suggested that all amendments could be activated for the court immediately upon adoption but vis-à-vis States Parties one year after their ratification or acceptance of the amendments. This would allow the court to receive Security Council referrals of aggression immediately but would delay the ability of States Parties and the Prosecutor to initiate aggression prosecutions until the requisite ratifications had accumulated. *Id.* at 1 n.2. All the new provisions were potentially subject to a delayed entry into force. *Id.* at 4 n.4, 5 n.7. The rest of the proposed package remained unchanged.

153. In earlier diplomatic meetings, Canada had floated a consent-based menu approach to jurisdictional filters. See Draft Proposal of Canada (July 7, 2009) (on file with the author); Kreß & von Holtzendorff, *supra* note 63, at 1202–03 (describing proposal); see also Coracini, *supra* note 42, at 758–59 (discussing and critiquing Canadian approach). According to the original iteration of this model, upon ratification of the amendments, States Parties could indicate which filter mechanism(s) they would accept. Once the Prosecutor initiated an aggression investigation, the acceptable filter mechanism would operate on the basis of reciprocity along the lines of the ICJ's optional clause. After the General Assembly and International Court of Justice filter options disappeared from the Chair's Conference Room Paper, Canada refined its proposal and circulated a text providing that in the absence of a Security Council determination that a state had committed an act of aggression, the Prosecutor could proceed with an investigation if the Pre-Trial Chamber granted authorization, so long as all states concerned with the alleged act of aggression had accepted this role for the Pre-Trial Chamber. See Refined Proposal of Canada art. 15bis (on file with the author). Attempting to bridge the gap between Boxes 2 and 3, the proposal envisioned that the court could immediately exercise jurisdiction over aggression cases with a Security Council determination and that the reciprocity regime would become operational once at least two states had adopted the aggression amendments.

154. See Declaration (Draft of June 9, 2010, 2010 16h00) (on file with the author); see also Wenaweser, *supra* note 51, at 885 (describing joint proposal); Kreß & von Holtzendorff, *supra* note 63, at 1203–04 (also describing the joint proposal).

155. Declaration (Draft of June 9, 2010, 16h00), *supra* note 154, art. 15bis(1).

filter and then a fall-back Pre-Trial Chamber filter as set forth in Alternative 2 of the prior Conference Room Paper. Although it was not spelled out, the joint text seemed to assume that Security Council referrals could commence immediately upon adoption of the aggression amendments.

Signaling an enormous concession on the part of the ABS coalition, the joint submission adopted Canada's earlier consent- and reciprocity-based approach,¹⁵⁶ and contained an opt-out provision for States Parties similar to, but more robust than, Article 124 of the existing ICC Statute, which pertains to war crimes.¹⁵⁷ This joint text stated that the aggression provisions would be applicable to state party nationals and territory unless the party submitted an opt-out declaration prior to December 15, 2015 to the Secretary-General of the United Nations. (Any state that ratified or acceded to the Rome Statute after that date would have to file the declaration of non-acceptance on the date of ratification or accession). The opt-out declaration could be withdrawn at any time.¹⁵⁸ In another concession, this joint text stated that in "respect of a State which is not a party to

156. See *supra* note 153; see also Trahan, *supra* note 80, at 73 n.97 (noting that the opt out was meant to bridge the gap between states supporting the ABS Proposal and the earlier Canadian proposal). As Barriga and Grover note, "[t]he chief negotiators could not ignore this significant agreement struck between delegations representing fundamentally opposed positions on the question of aggressor State consent, who were willing to actively promote their compromise among other delegations." Barriga & Glover, *supra* note 98, at 8.

157. See ICC Statute, *supra* note 3, art. 124 ("Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.").

158. Declaration (Draft of June 9, 2010, 16h00), *supra* note 154, art. 15bis(4bis-4ter). If withdrawn, it was not clear if the opt-out declaration could be re-lodged either indefinitely or at least prior to December 15, 2015. Japan subsequently built on this proposal with an opt-out scheme of its own that envisioned that upon the ratification of the aggression amendments by seven eighths of States Parties that have not filed the opt-out declaration, the Assembly would convene another Review Conference to consider whether the provisions should enter into force for all States pursuant to the conditions for jurisdiction set out in Article 12 and applicable to the other three crimes. This proposal stated unambiguously that "[t]he court may not exercise jurisdiction with respect to a crime of aggression committed by a non-State Party." This latter phrase probably should have read "act of aggression" given the distinction made in Article 8bis between acts of aggression, which are committed by states, and crimes of aggression, which are committed by individuals. This proposal was not well circulated or extensively discussed. See Japanese Proposal, The Following Is Inserted after Article 15 of the Statute (on file with the author).

this Statute, this Court shall not exercise its jurisdiction over the crime of aggression as provided for in this article when committed by that State's nationals or on its territory."¹⁵⁹ Although this passage seemed designed to exclude Non-Party States altogether from the aggression provisions, the draft text contained language identical to the second sentence of Article 121(5), thus reproducing the ambiguity over the Negative and Positive Understanding of that article. In explanation, proponents insisted that the object of this text was in fact to exempt Non-Party States. That said, the entire package, and particularly the opt-out declaration, was premised on an entry into force pursuant to the Positive Understanding of Article 121(5), thus suggesting that the same language in different parts of the Statute would have entirely different meanings, contrary to standard interpretative principles.¹⁶⁰ This joint text marked the convergence of the two primary positions opposed to Security Council control over aggression prosecutions—the ABS group, which favored a broad jurisdictional regime, and the more moderate group of states led by Canada, which favored non-political and consent-based limits on the court's jurisdiction.

Once the Working Group completed its work and adopted its Report,¹⁶¹ the President of the Assembly of States Parties, Christian Wenaweser, made his first public foray into the aggression deliberations mid-day on June 10, with a Non-Paper in the form of a draft resolution on the crime of aggression that was based on informal consultations with states.¹⁶² This was the first of three Non-Papers in which the President attempted to bring the negotiations to a close. From this point onward, negotiations proceeded in informal settings rather than plenaries, so there is little formal record of states' views on these texts. Like the Chair's final Conference Room Paper, the President's first Non-Paper also adopted the two-tiered formula of the ABS Proposal by bifurcating the amendments into Article 15bis, governing non-Security Council-triggered investigations, and Article 15ter, governing Security Council-triggered investigations. For state referrals and *proprio motu* investigations, the choice was still be-

159. See Japanese Proposal, *supra* note 158.

160. See generally AUST, *supra* note 71, at 235, 244 (noting that terms in a treaty are to be given their ordinary meaning unless the parties intended some special meaning).

161. Draft Report of the Working Group on the Crime of Aggression, U.N. Doc. RC/WGCA/3 (June 6, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-WGCA-3-ENG.pdf.

162. Non-Paper by the President of the Assembly, Draft Resolution: The Crime of Aggression, June 10, 2010, 12h00 (on file with author).

tween an exclusive Security Council filter (Alternative 1) and a filter that, in the absence of Security Council action, reverted to the Pre-Trial Chamber (Alternative 2). The provisions for a Security Council filter in Article 15ter governing Council referrals were bracketed for the first time.

With respect to potential Security Council referrals, the public record does not disclose which state proposed the idea of collapsing the trigger and filter in Article 15ter, and no participating state spoke in favor of it publicly. This formula seemed positioned as a concession to those states opposed to a strong role for the Security Council in aggression prosecutions because it eliminated one mechanism of Council control over the process.¹⁶³ It was not clear, however, if it was perceived as a concession or if it generated any counter concessions or change in position from the ABS group. The effect of eliminating the Article 15ter filter was that in the case of a situation referred to the court by the Security Council, the Prosecutor could investigate potential charges of aggression without any further Security Council involvement (other than a potential Article 16 deferral).¹⁶⁴ Had the filter remained in Article 15ter, the Prosecutor would need to have determined whether the Council had made the necessary aggression determination if he or she wanted to pursue aggression charges vis-à-vis a situation referred by the Council. There was some concern that a filter-less Article 15ter would serve as a disincentive to the Council to refer situations involving potential aggression charges to the court because it could not easily control which charges the Prosecutor would ultimately seek to bring. This was weakly addressed in footnote 8 of the Non-Paper, which stated, “this article should not negatively affect the ability of the Security Council to exercise its competence under Article 13(b).”¹⁶⁵

As a part of the President’s Non-Paper, Article 15bis was subject to a bracketed opt-out option¹⁶⁶ and a bracketed exclusion of jurisdiction over the nationals of Non-Party States,¹⁶⁷ both elements

163. See Wenaweser, *supra* note 51, at 886 (describing Article 15ter as “streamlined” and a “simplification of the procedure for investigations based on a Security Council referral . . . which would eliminate the previously implied need for the Prosecutor to go back to the Security Council for a determination of an act of aggression.”).

164. David Scheffer argues that any situation referred to the court by the Security Council and involving acts of aggression should be automatically deemed to meet any gravity threshold. See Scheffer, *supra* note 148, at 899.

165. Non-Paper by the President of the Assembly, *supra* note 162, at 3 n.8.

166. *Id.* art. 15bis(1bis).

167. *Id.* art. 15bis(1ter) (“The Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party.”). This formulation did not mirror the joint

borrowed from the ABS/Canada joint text. The Non-Paper envisioned amendments entering into force pursuant to Article 121(5), but no longer included any proposed understandings on how the second sentence of that provision should be interpreted. So, it was conspicuously silent on whether the Positive or Negative Understanding was operative.¹⁶⁸ The logic of the opt-out declaration, however, at least suggested that the Non-Paper was based on the Positive Understanding. In other words, the court could exercise jurisdiction over the nationals of States Parties that had not ratified or accepted the aggression amendments so long as the putative victim state(s) had ratified or accepted.¹⁶⁹ To avoid this, the putative aggressor state would have to avail itself of the opt-out provision.

In the waning hours of June 10, the President issued his second Non-Paper.¹⁷⁰ According to this Non-Paper, neither trigger mechanism would be operative until five years after the adoption of the amendments and one year after the ratification or acceptance of the amendments by thirty States Parties—a number that would signal

proposal completely; under this wording, the court could still exercise jurisdiction over acts of aggression committed on the territory of Non-State Parties.

168. This Non-Paper for the first time referred to Article 12(1) in addition to Articles 5(2) in the preamble to the draft enabling resolution text, suggesting that States Parties had already pre-consented to the court exercising jurisdiction over the crime of aggression and thus justifying the opt-out option and exclusion of express Non-Party States from the amendments. *Id.* pmbl.

169. The Non-Paper also resolved some smaller open issues. With regard to the court's temporal jurisdiction over crimes of aggression, it provided that crimes of aggression committed after the aggression provisions had entered into force (rather than after they had been adopted) would be within the court's *ratione temporis*. The Non-Paper also stated that the Security Council would be able to commence referrals once the amendments entered into force. In an Annex, the Non-Paper included some new understandings on the definition of the crime of aggression and on the operation of the principle of complementarity—understandings that had been considered in a parallel set of negotiations driven largely by the United States. See Beth Van Schaack, *Understanding Aggression II*, INTLAWGRRLS (June 26, 2010), <http://intlwgrrls.blogspot.com/2010/06/understanding-aggression-ii.html>; Beth Van Schaack, *Understanding Aggression I*, INTLAWGRRLS (June 24, 2010), <http://intlwgrrls.blogspot.com/2010/06/understanding-aggression.html>. Later that day, the President released a draft text setting forth an opt out that would have expired seven years after adoption unless the State Party re-affirmed it. Although some members of the ABS group had called for any opt out to be subject to a sunset clause, the expiring opt out apparently received insufficient support and did not appear in any subsequent consolidated text. The President also circulated another text that would have delayed the amendments' entry into force for seven years, a period of time that paralleled the time period established for the first Review Conference. See ICC Statute, *supra* note 3, art. 123.

170. Second Non-Paper by the President of the Assembly, Draft Resolution: The Crime of Aggression, June 10, 2010, 23h00 [hereinafter ASP President Second Non-Paper].

at least some state support for the amendments.¹⁷¹ Article 15ter, addressing Security Council-triggered prosecutions, contained no filter mechanism, as had been anticipated from the prior Non-Paper. Article 15bis, concerning non-Council-triggered situations, was now expressly inapplicable to Non-Party States whether they be aggressors or aggressed against.¹⁷² Alternative 1 (exclusive Security Council filter) and a slightly modified Alternative 2 (which involved a Pre-Trial Division (*en banc*) rather than a Pre-Trial Chamber back-up filter) remained in play with respect to Article 15bis. Both had bracketed text additions. The “green light” option also appeared in bracketed text in connection with Alternative 1 as another way for the Security Council to allow an aggression prosecution to go forward. Alternative 2 was subject to new bracketed text suggesting that the Security Council could still block a prosecution through the exercise of a red light function separate from and more robust than the Council’s deferral powers under Article 16.¹⁷³

The second Non-Paper also contained a slightly less robust opt-out option than the first iteration: it required States Parties to at least “consider” their opt-out declaration every three years, although there was no expiration provision.¹⁷⁴ The second Non-Paper’s final difference included a review clause mandating an evaluation of all the amendments on the crime of aggression seven years after the be-

171. *Id.* arts. 15bis(1bis), 15ter(2).

172. *Id.* art. 15bis(1quater) (“In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”) This opt-out formulation also designated the Registrar, rather than the UN Secretary General, as the recipient of any declarations lodged. The latter is the recipient of declarations filed under Article 124. *See* ICC Statute, *supra* note 3, art. 124. This has given rise to concerns that declarations opting out of the aggression amendments may not be made public. *See* Coracini, *supra* note 42, at 761, 779.

173. The text read:

Where no such determination [by the Council] is made . . . the Prosecutor may proceed with the investigation . . . provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, [and the Security Council does not decide otherwise.]

ASP President Second Non-Paper, *supra* note 170, art. 15bis(4) (Alternative 2) (second set of brackets in original).

174. *Id.* at 15bis(1ter) (“The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be affected at any time and shall be considered by the State Party within three years.”).

ginning of the court's exercise of jurisdiction,¹⁷⁵ which signaled that detractors might get a chance to revisit the crime's definition as well as other elements of the amendments. In practical terms, any review conference would have convened no earlier than twelve years, when the seven-year lag was combined with the delayed activation of the amendments, which was slated to take at least five years. Given the increasingly cumbersome procedure set forth in Article 15bis, the Non-Paper prompted renewed calls by some members of the P-5 to eliminate Article 15bis altogether and launch only Article 15ter, with the understanding that delegates would continue work on Article 15bis. There were other calls as well to finalize the definition only.¹⁷⁶ In terms of activation of the amendments, Article 121(5) remained operative.¹⁷⁷

After a day of informal negotiations and other Review Conference business, the President released a third and final Non-Paper on the afternoon of June 11. This Non-Paper contained almost all of the elements that would become the final package. On several fronts, this third Non-Paper further diminished the role of the Security Council in Article 15bis situations. First, the third Non-Paper revealed a major, controversial but not totally unsurprising development: the elimination from Article 15bis of Alternative 1, which embodied the idea of an exclusive Security Council filter.¹⁷⁸ Instead, prosecutions initiated through state referrals or *proprio motu* action would be subject to a Pre-Trial Division filter involving all of the Pre-Trial Chamber judges in the event that the Security Council had not already made an affirmative aggression determination.¹⁷⁹ The

175. *Id.* art. 3bis.

176. On the morning of June 11, the African Group issued an unenthusiastic response to the Second Non-Paper. In essence, the African Group viewed this Non-Paper as a step back and argued that the opt out should be subject to expiration, that no subsequent review conference should be mandated, that the delayed entry into force should be eliminated for Article 15bis at least, and that Alternative 1 allowing a Security Council filter should be excised. The African Group did, however, accept the language of draft Article 1quater, which was significant because the provision exempted Non-Party States from the aggression provisions altogether. African Group's Response to the Non-Paper by the President of the Assembly of the 10th June 2010 (on file with the author).

177. ASP President Second Non-Paper, *supra* note 170, at opening para.1. This Non-Paper also added a reference to Article 5(2), which states that any definition of aggression and jurisdictional regime is to be consistent with the UN Charter. *See supra* note 3.

178. Third Non-Paper by the President of the Review Conference, June 11, 2010, 16h30 (on file with author).

179. It has been noted that requiring this *en banc* determination "complements the substantive requirement that the state act of aggression must constitute a manifest violation of the Charter of the United Nations." Blokker & Kreß, *supra* note 35, at 893–94.

“green light” option for the Security Council also disappeared, mandating an express aggression determination by the Council. In addition, the lack of any red light option ensured that the Council could block a prosecution only through the exercise of its Article 16 powers, which allows for a renewable deferral rather than a complete termination of a case.¹⁸⁰ The temporary nature of an Article 16 deferral renders it a weaker control mechanism than the red light option, which had appeared in brackets in the prior Non-Paper, although both would be subject to the Council veto.

In other developments, the opt-out option remained, as did the exclusion of Non-Party States.¹⁸¹ None of the provisions would be in force until at least one year after thirty States Parties had ratified or accepted the aggression amendments—a more uncertain date than envisioned by some prior proposals.¹⁸² Seven years after the court had begun to exercise jurisdiction over the crime, the Assembly of States Parties would review all the amendments—definitional and jurisdictional—on the crime of aggression.¹⁸³ Finally, and crucially, the third Non-Paper contained placeholders for activating Articles 15bis and 15ter, signaling the last open issue of the Review Conference. Like previous Non-Papers, this version recalled Article 12(1) of the ICC Statute,¹⁸⁴ which sets forth the jurisdictional preconditions for the existing crimes within the court’s jurisdiction, noted that the amendments would be adopted in accordance with Article 5(2) and identified that the amendments would enter into force in accordance with Article 121(5).¹⁸⁵

With most of the elements of a final package in place, attention now turned to reaching the optimum balance of automaticity and conditionality for operationalizing Articles 15bis and 15ter. In the somewhat frenzied informal negotiations that ensued, proponents of a rapid implementation of the prohibition on the crime of aggression sought to lock in the text achieved and to ensure its automatic, if delayed, operationalization. In contrast, other states sought to keep open the possibility of reconsidering at a later date both the text of the amendments and the very operationalization of the crime.

180. ICC Statute, *supra* note 3, art. 16.

181. Third Non-Paper by the President of the Review Conference, *supra* note 178, at 3.

182. *Id.* at 3–4.

183. *Id.* at 1.

184. *Id.* at pmbl, para. 1.

185. *Id.* at opening para. 1.

One proposal from the Chair, for example, would have delayed entry into force for both Articles 15bis and 15ter until at least 2017.¹⁸⁶ After that date, Article 15bis would have become operational only once States Parties so decided. In contrast, Article 15ter was subject to a flipped presumption such that it would have become operational in that year, unless States Parties decided otherwise.¹⁸⁷ This text thus contemplated the possibility of an exclusive Security Council trigger in the event that the Assembly of States Parties could not agree to activate Article 15bis. Another solution from a participant provided that Article 15bis would only enter into force following a consensus decision of States Parties or the entry into force of an amendment to that effect.¹⁸⁸ Either action had to be taken at a Review Conference to be held no earlier than seven years after the adoption of the amendments on the crime of aggression. This scheme suggested that the States Parties could also consider “any related amendments proposed for the Statute with the aim of strengthening the Court,”¹⁸⁹ which was likely code for reconsidering Article 8bis as well. Other ideas swirling around for resolving the conditionality/automaticity conundrum included holding off on operationalization but mandating that a Review Conference be convened “with a view toward” adopting the amendments and exploring alternative voting procedures or thresholds, such as a simple majority with some geographic proportionality.

At the literal eleventh hour on the final day of the Conference, the President released a text containing the entry into force provisions that were missing from the final Non-Paper.¹⁹⁰ According to the final provisions, which are identical, both Articles 15bis and 15ter are subject to activation no earlier than January 1, 2017, following a “decision to be taken . . . by the same majority of States Parties as is required for the adoption of an amendment to the Statute.” Even then, the amendments adopted will not be operational until a year after thirty states have ratified or accepted them.¹⁹¹ In a nod to opponents

186. Proposal on file with the author.

187. See Wenaweser, *supra* note 51, at 886 (describing this proposal). As discussed *infra*, the final text eliminated this presumption and subjected all trigger mechanisms to an affirmative vote of the ASP.

188. Proposal on file with the author.

189. *Id.*

190. New PP 6: Resolved to activate the court’s jurisdiction over the crime of aggression as early as possible, June 11, 2010, 23h00 (on file with author).

191. Presumably, even states that exercise their opt-out rights will be counted toward this threshold. Scheffer, *supra* note 148, at 903 n.4.

of the crime, the President erred on the side of conditionality, essentially pushing off to another day the decision to operationalize all aspects of the amendments. The enabling resolution calls on states to ratify the amendments. As a practical matter, however, some states may find it politically difficult to ratify or formally accept the amendments until after States Parties have decided in 2017 on whether to implement both Articles 15bis and 15ter. That said, there is nothing within the final resolution that prevents States Parties from ratifying or accepting the amendments in their current, uncertain and partial form. Accordingly, depending on how long it takes for thirty States Parties to ratify the amendments, it may be a decade or more before the court has the capacity to actually prosecute aggression.

Because it appears that States Parties must decide whether to activate both Articles 15bis and 15ter, the Assembly of States Parties could conceivably implement a sequential activation of Security Council and non-Security Council referrals in 2017. According to the final text, this decision need not be taken at a formal Review Conference.¹⁹² Some no doubt will argue that there is no need to convene an entire Review Conference to consider the operationalization of text that has already been the subject of intensive negotiations. In any case, the text suggests that this decision to operationalize Articles 15bis and/or 15ter is to be taken by the “same majority of States Parties as is required for the adoption of an amendment to the Statute”—a reference to Article 121(3), which urges adoption of amendments by consensus but allows for a two-thirds majority to prevail where consensus cannot be reached.¹⁹³

E. The Provisions Adopted

Assuming the aggression amendments become operational, a prosecution can only go forward a year after the necessary States Parties have accepted or ratified the aggression amendments pursuant to Article 121(5) in the absence of a Security Council referral. With the disappearance of the draft understandings on the interpretation of Article 121(5), the final resolution is concertedly ambiguous as to whether the Negative or Positive Understanding of Article 121(5)

192. Article 123(2) provides that the Secretary General, upon the request of a State Party and the approval of a majority of the States Parties, can convene subsequent Review Conferences.

193. That Article reads: “the adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”

applies.¹⁹⁴ Thus it is the court that will ultimately decide whether the ratification or acceptance of the aggression amendments by the putative aggressor state(s), the victim state(s), or both, is a precondition for jurisdiction—or even whether Article 121(5) is the appropriate amendment provision at all. In its decision, it will no doubt be guided by Article 22(2) which sets forth the principle of lenity.¹⁹⁵ This threshold determination will likely consume considerable pre-trial resources in the inaugural aggression case. In any case, no prosecution will go forward if the aggressor state is a state party that has availed itself of the opt-out option or if the potential defendant is a national of a non-state party.

With either a state party¹⁹⁶ or *proprio motu* referral,¹⁹⁷ the Security Council will operate as a preliminary filter mechanism. Six months after ascertaining inaction by the Council, the Prosecutor will go to the Pre-Trial Division and will have to convince four judges to allow the aggression investigation to proceed.¹⁹⁸ The Pre-Trial Divi-

194. See Burns Weston, *Nuclear Weapons and the World Court: Ambiguity's Consensus*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 384 (1997) (discussing concept of ambiguity's consensus in treaty drafting).

195. ICC Statute, *supra* note 3, art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.").

196. In the event of a state referral, the prosecutor can also decline to initiate an investigation for the reasons set forth in Article 53 of the ICC Statute, including that the particular prosecution is against the "interests of justice." *Id.* art. 53.

197. As the Statute now stands, if the prosecutor initiates the investigation *proprio motu*, he will first need to prove to the Pre-Trial Chamber that there is "a reasonable basis to proceed" with the investigation at all, even prior to determining whether aggression charges might be warranted. *Id.* art. 15. If the prosecutor decides to bring aggression charges, she or he will need to pass through the two filters—the Security Council and Pre-Trial Division. *Id.* The latter filter also operates according to Article 15 but involves the Pre-Trial Division rather than just a Pre-Trial Chamber. *Id.* It is unclear from the final text whether these two pre-trial forays could be collapsed into one. *Id.* Theoretically, the prosecutor may need to get authority to proceed from a Chamber first and then go back to the entire Division if he opts to pursue aggression charges. *Id.* That said, the text suggests that prior to seeking the authority to proceed at all, the Prosecutor could first confirm inaction on the part of the Security Council and then—six months later—seek both the general approval to proceed as well as to bring aggression charges. *Id.*

198. *Id.* Article 15 does not give any participatory rights to states. During the preliminary investigation phase, prior to when the Prosecutor goes before the Pre-Trial Chamber for approval to proceed, Article 15(2) invites the Prosecutor to seek additional information and written or oral testimony from states, UN organs, non-governmental organizations and other reliable sources to determine the "seriousness" of the information received. Once the Prosecutor goes before the Chamber, however, only victims are entitled to make representations according to Article 15(3). Indeed, states have few participatory

sion will no doubt take judicial notice of, and accord significant evidentiary weight to, the fact that the Security Council declined to either refer the situation itself or to make the necessary aggression determination.¹⁹⁹ Presumably, this preliminary finding of the commission of an act of aggression will be subject to an interlocutory appeal. The appeal can take the form of either a decision on jurisdiction pursuant to Article 82(1)(a) of the ICC Statute, or a “decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings” pursuant to Article 82(1)(d).²⁰⁰ The Security Council can refer situations involving aggression but need not make an express aggression determination while doing so.²⁰¹ At any point, the

rights in the ICC Statute outside of the context of asserting the privilege of complementarity pursuant to Articles 18 and 19 and contesting the existence of preconditions to jurisdiction under Article 12. This is perhaps understandable given that with respect to the original crimes, the court exercises jurisdiction over individuals and not States. Because the Article 15 process launches the formal investigation, it normally occurs prior to the identification of particular defendants. As a result, no provision allows an accused to participate in this process either. Thus, absent some amendment to the ICC Statute (which would likely be an amendment “of an institutional nature” governed by Article 122) or procedural rule to govern the aggression context, neither states nor defendants are entitled to raise arguments on behalf of the supposed aggressor state at the time that the Pre-Trial Division is to make the aggression determination.

199. *Id.* art. 15(3). In terms of the applicable burden of proof under Article 15, the Prosecutor must demonstrate a “reasonable basis to proceed” with a *proprio motu* investigation according to Rome Statute Article 15(4). *Id.* art. 15(4). At the moment, this burden of proof appears to apply at the time of the Pre-Trial Division’s aggression finding as well. States did not contemplate altering this burden, although they might have.

200. It is not clear which person or entity would have standing to invoke such an appeal in the event that the Pre-Trial Chamber allowed a formal aggression investigation to proceed. At this preliminary stage, it is unlikely that an individual defendant will have been publicly identified or have made an appearance before the court. States are not given any rights to appeal under the Statute except within Article 57(d)(3) following a decision by the Pre-Trial Chamber to allow for *in situ* investigations in non-cooperating states. Allowing implicated states the right to appeal the aggression determination by the Pre-Trial Chamber would have required amendment to Article 82. *Id.* art. 88. Questions about how to implement the procedures governing the aggression determination may be able to be dealt with through amendments to the Rules of Procedure and Evidence, which are adopted by a two-thirds majority of the Assembly of States Parties. *Id.* art. 51(1). In the absence of a relevant rule, the judges can devise an interim rule subject to the principle of lenity. *Id.* arts. 51(3) and (4).

201. See Blokker & Kreß, *supra* note 35, at 893 (opining that enabling the Council to make a referral without making an aggression determination will provide greater flexibility for the Council).

Security Council can exercise its Article 16 powers and defer the prosecution for a year, on a renewable basis, so long as it can garner the necessary majority and avoid a veto.²⁰² In light of the circuitous and cumbersome jurisdictional regime created by the new amendments combined with the existing jurisdictional obstacles in the ICC Statute, aggression prosecutions will likely be few and far between.

III. ELEMENTS OF THE PACKAGE

Each element of the negotiations and final compromise package implicates basic concepts of public international law: the supremacy of the Security Council in the face of breaches of the peace, judicial independence and the principle of state consent. The amendments are ultimately a triumph of voluntarism, which underlies both the opt-out provision and the exclusion of Non-Party States. With respect to consenting States Parties, the amendments largely promote the judicial independence of the ICC, subject only to the extant Security Council deferral power. Although members of the P-5 had hoped to expand the Security Council's power over ICC prosecutions in the aggression context, this was not achieved. If anything, the amendments signal a subtle erosion of Security Council power. It remains to be seen, however, whether the Council will use Article 13(b) referral and the Article 16 deferral powers to control the ability of the court to prosecute the crime of aggression.²⁰³

202. Assuming the filter allows the investigation into crimes of aggression to go forward and the Council does not defer, normal pre-trial obstacles come into play. If the Prosecutor subsequently seeks a warrant for the arrest of a suspect, he or she will need to demonstrate that there are "reasonable grounds to believe that the person" committed the crime of aggression. ICC Statute, *supra* note 3, art. 58(1)(a). The charges will then have to be confirmed, requiring "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged." *Id.* art. 61(5). Only once these hurdles are crossed, can the prosecution go forward. Conviction of the crime of aggression will require proof beyond a reasonable doubt that a State Party committed an act of aggression and the defendant committed the crime of aggression. *Id.* art. 66.

203. The question of what limits, if any, are placed on the Security Council when it is operating within its sphere of competency is not new. See Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 287 (1996) (exploring to what extent the *ius ad bellum* and *ius in bello* apply to Council enforcement actions under Chapter VII). To the extent that such limits exist, their justiciability remains equally unresolved. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 13–40 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (considering to what extent the ICTY could exercise

A. Judicial Independence Versus Security Council Supremacy in International Peace and Security

Because the definition of aggression seemed destined to remain indeterminately expansive, the question of filters took on great importance. The debate came down to which entity—political or judicial, internal or external—would be empowered to determine whether a particular act of state constituted a “manifest” violation of the UN Charter. This, in turn, presented the question of whether the court would have some measure of autonomy from the Security Council vis-à-vis the crime of aggression in the event of Council inaction. At one end of the spectrum was an exclusive and determinative Security Council filter; at the other end was no filter whatsoever, which would allow state referrals and prosecutor-initiated cases to go forward unsupervised except insofar as they are subject to Article 16. Positioned between these polarities were alternative filters that could operate in lieu of a Council filter or in tandem with it in the event the Security Council declined, or failed, to make the necessary aggression determination. Of all the filter alternatives under consideration, only the Pre-Trial Chamber was both politically palatable to the majority of States Parties and logistically feasible. The other alternatives remained controversial and presented problems of implementation that prevented their serious consideration as points of potential compromise.²⁰⁴

1. The Security Council Filter

There was no question that the Security Council could function as an aggression filter. Thus, debates centered on whether fealty to the UN Charter demanded, or in any case counseled, that the Council be given such a gate-keeping role, especially in light of the fact that it already possessed a controversial control mechanism in the form of its Article 16 deferral power.²⁰⁵ The interventions of the

judicial review over the decision of the Security Council that created the tribunal in response to the armed conflict in the former Yugoslavia).

204. Int'l Criminal Court, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 35–41, U.N. Doc. ICC-ASP/5/35, Annex II (2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-35_English.pdf (discussing alternative filters as potential compromises).

205. That the P-5's veto operated differently when the Council was acting as a filter versus when it is activating its Article 16 power no doubt led to the unpopularity of the former. Specifically, with respect to Article 16, the operation of the veto allows a

P-5—particularly Russia, China and France—identified Security Council primacy and exclusivity in aggression prosecutions as both a legal imperative and a point of principle.²⁰⁶

It was not always perceived as such by other states involved in the negotiations, however. The P-5's legal arguments were Charter-based and turned on, *inter alia*, the Charter language in Article 12(1), which states that while the Council is engaged with a situation, the General Assembly must refrain from making recommendations regarding the dispute;²⁰⁷ Article 24(1), which confers "primary" responsibility on the Council for the maintenance of international peace and security;²⁰⁸ and Article 39, which empowers the Council to determine threats to the peace, breaches of the peace and acts of aggression.²⁰⁹ Given this textual mandate, the P-5 argued that no act of aggression could be considered a "manifest" violation of the Charter absent a Council determination to this effect. They also argued that reserving an exclusive role for the Council was consistent with the text, logic and intent of General Assembly Resolution 3314 (1974), which served as the backbone for the definition of the crime of aggression.²¹⁰

Despite these arguments, the Security Council exclusivity thesis came under fire for being without a firm basis in the text of the UN Charter and inconsistent with UN practice. To be sure, the Char-

prosecution to go forward, whereas with respect to the filter, exercise of the veto would block an aggression determination and thus a prosecution. ICC Statute, *supra* note 3, art. 16.

206. See *supra* text accompanying note 32.

207. U.N. Charter art. 12, para. 1 ("While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.").

208. *Id.* art. 24, para. 1 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.").

209. *Id.* art. 39, para. 1 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.").

210. This Resolution recognizes at a number of points the unique role of the Security Council. In particular, Article 2 acknowledges that there may be situations when the Council would decline to make an aggression finding notwithstanding a violation of Article 2(4) of the Charter or the Resolution itself. In addition, the Resolution reflects the fact that the Council may deem certain uses of force to be legal or justified. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

ter grants the Council an exclusive right to make an aggression determination for the purposes of enforcement measures governed by Article 44. That said, the Charter envisions a role in this context for other organs of the United Nations. For one, Article 24(1)'s assignment of "primary" responsibility to the Council implies that this power is not exclusive.²¹¹ Indeed, Article 1(1) lists the purposes of the entire United Nations as follows:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²¹²

The General Assembly has, especially in situations in which the Council did not act, invoked Charter recommendatory powers²¹³

211. *But see* CRIME OF AGGRESSION: STATEMENT BY THE UNITED STATES 3 (Sept. 26, 2001), <http://www.state.gov/documents/organization/16461.pdf> (arguing that "primary" refers to the fact that the maintenance of peace and security is the Council's most important function, rather than that there exists some UN organ with concurrent power).

212. U.N. Charter art. 1, para. 1.

213. *Id.* art. 11, para. 1 (empowering the General Assembly to consider situations involving international peace and security and make recommendations to states and the Council); *see, e.g.*, G.A. Res. 46/242, U.N. Doc. A/RES/46/242 (Aug. 25, 1992) (concerning acts by Serbia and Montenegro against Bosnia-Herzegovina); G.A. Res. 37/18, U.N. Doc. A/RES/37/18 (Nov. 16, 1982) (concerning aggressive acts committed by Israel against Iraqi nuclear installations); G.A. Res. 37/3, U.N. Doc. A/RES/37/3 (Oct. 22, 1982) (considering the prolongation of the Iran-Iraq conflict and reaffirming that no act of aggression should be committed); G.A. Res. 36/226, U.N. Doc. A/RES/36/226 (Dec. 17, 1981) (concerning Israel's act of "aggression" in Lebanon); G.A. Res. 36/172, U.N. Doc. A/RES/36/172 (Dec. 17, 1981) (concerning aggressive acts committed by South Africa in the region); G.A. Res. 36/27, U.N. Doc. A/RES/36/27 (Nov. 13, 1981); G.A. Res. 2795 (XXVI), U.N. Doc. A/RES/2795 (Dec. 10, 1971) (concerning acts committed by Portugal against Guinea-Bissau and Cape Verde, but not employing the term "aggression"); G.A. Res. 2508 (XXIV), U.N. Doc. A/RES/2508 (Nov. 21, 1969); Question of South West Africa, G.A. Res. 1899 (XVIII), U.N. Doc. A/RES/1899 (Nov. 13, 1963) (considering "any attempt to annex a part or the whole of the Territory of South West Africa [to constitute] an act of aggression"); *see generally* UNITED NATIONS, HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION 242–51 (2003) (compiling resolutions).

such as those embodied in its 1950 Uniting for Peace Resolution²¹⁴ to condemn state actions as aggression.²¹⁵ Presumably, the Assembly could have continued this tradition had it been assigned a filter function.²¹⁶ The International Court of Justice (ICJ) has also been asked to rule on the legality of uses of force, conceivably opening the door for the ICJ to serve this function in a filter capacity as well.²¹⁷

When the P-5's legal arguments proved unconvincing,²¹⁸ policy arguments rose to the fore. The United Kingdom noted in an intervention that the ICC will be most effective when it is working in tandem with—or at least not in opposition to—the Council, as the latter body seeks to maintain, or restore, international peace and security.²¹⁹ Given that the crime of aggression involves both state and individual action, the P-5 posited that an effective division of labor between the Council and the court would reflect each entity's core institutional competencies while protecting both the integrity of the Charter system and the legitimacy of the court.²²⁰ Indeed, the P-5 argued, externalizing the aggression determination to the Council might actually insulate the court from charges of politicization.²²¹

214. G.A. Res. 377, U.N. Doc. A/RES/377(V) (Nov. 3, 1950) (asserting that the Assembly may make "appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force.").

215. See, e.g., G.A. Res. 498, U.N. Doc. A/RES/498(V) (Feb 1, 1951) (calling China's actions in Korea "aggression"). Even the Security Council has invoked the Uniting for Peace Resolution. See S.C. Res. 303, U.N. Doc. S/RES/303 (Dec. 6, 1971); S.C. Res. 157, U.N. Doc. S/RES/157 (Sept. 17, 1960); S.C. Res. 129, U.N. Doc. S/RES/129 (Aug. 7, 1958); S.C. Res. 120, U.N. Doc. S/RES/120 (Nov. 4, 1956)

216. Such a determination would be considered an "important decision" subject to a two-thirds vote of those present and voting pursuant to Article 18(2) of the UN Charter. U.N. Charter art. 18, para. 2.

217. See *infra* text accompanying note 241.

218. Blokker & Kreß, *supra* note 35, at 894 (arguing that the P-5's legal arguments for a monopoly over the crime of aggression were unpersuasive).

219. See also Int'l Criminal Court, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶ 23, U.N. Doc. ICC-ASP/5/35, Annex II (2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-35_English.pdf (noting the view that "the Court would benefit from the authority of the Security Council as there would be political backing for the Court's investigation of situations.").

220. For summaries of these negotiating positions, see Report of the Working Group on the Crime of Aggression, Annex II, RC/20, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-20-ENG-Annex.II.WGCA.report.pdf.

221. Int'l Criminal Court, Assembly of States Parties, 6th Sess., Nov. 30–Dec. 14, 2007, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*,

The United States posited that States Parties should refrain from establishing a system that would either invite tensions, if not outright conflict, between multiple United Nations bodies or that would generate potentially contradictory interpretations of aggression and sow confusion within the international community. In particular, the specter of a “constitutional crisis” within the United Nations was raised if the ICC convicted a defendant of aggression in the absence of an aggression determination by the Security Council.²²² Such a situation would inevitably undermine the credibility of all the institutions involved and provide an easy basis for observers (hostile or otherwise) to reject the court’s judgment.

Despite their rhetorical force, arguments that the Charter system could not tolerate multiple interpretations of aggression proved unpersuasive in part because this potential for inconsistent pronouncements already exists in the tripartite UN framework: the Security Council, the General Assembly and the International Court of Justice may all address the same situation pursuant to their Charter mandates. In its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ confirmed that to the extent that there may once have been a Charter prohibition of simultaneous action, subsequent practice has superseded that prohibition.²²³

Other policy arguments were not fully explored. It was largely left unsaid in the plenaries that a Council gatekeeper would account for the reality that uses of force are rarely evaluated on the basis of their lawfulness alone; rather political, moral and even

¶ 25, U.N. Doc. ICC-ASP/6/SWGCA/INF.1 (July 25, 2007), available at http://www.icc-epi.int/iccdocs/asp_docs/library/asp/ICC-ASP-6-SWGCA-INF-1_English.pdf.

222. The opposite scenario—where the Council finds aggression, but the court acquits—would presumably not necessarily cause the same concerns, given that the court must make a legal determination based on a particular definition of aggression, admissible evidence and a penal burden of proof.

223. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 149 (July 9) (noting an increasing tendency for the Assembly and the Council “to deal in parallel with the same matter concerning the maintenance of international peace and security.”); see also *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20) (“The responsibility conferred [on the Security Council] is ‘primary,’ not exclusive. . . . The Charter makes it abundantly clear . . . that the General Assembly is also to be concerned with international peace and security. . . . [T]he functions and power conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations . . . [but include] ‘decisions’ . . . [with] dispositive force and effect.”).

consequentialist considerations inevitably come into play.²²⁴ Preserving a determinative role for the Council in aggression prosecutions would enable the Council to insulate from prosecution uses of force whose purpose or results may be deemed legitimate or meritorious, even though they may qualify as acts of aggression as understood by Article 8bis(2).

Such tricky situations might include instances of anticipatory self-defense in the face of an imminent attack; the defense of nationals or hostage rescues; episodes of hot pursuit or the abduction of fugitives; *bona fide* humanitarian interventions; armed responses to prior terrorist attacks, which may be directed against non-state actors or against states harboring terrorist groups or allowing their territory to be used as bases for terrorist attacks; participation in wars of national liberation; and regional responses to breaches of the peace or humanitarian crises. Any of these situations might be deemed an act of aggression within the Article 8bis definition.

Because the law is in flux in these areas, it was argued that keeping aggression prosecutions dependent on Security Council determinations would have ensured that the court remains consistent with the current state of international relations, as ultimately determined by the Council. This would ensure some degree of political consensus on whether a harmful act of aggression had been committed. A Security Council filter would also ensure that legitimate uses of force were not deterred by the fear that an unfettered Prosecutor or retaliating state party would launch a prosecution.²²⁵

This set of legal and policy arguments gained little traction in the face of the Council's inconsistent past practice vis-à-vis state acts that might be deemed to violate the UN Charter. Many detractors of a Security Council filter argued that the Council had never declared a state act to be aggressive.²²⁶ In reality, the Council has classified conduct as "aggression" on multiple occasions over the years.²²⁷

224. See, e.g., INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO: THE KOSOVO REPORT, available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm> ("The Commission concludes that the NATO military intervention was illegal but legitimate.").

225. Van Schaack, *supra* note 2 (discussing potential for the crime of aggression to chill humanitarian interventions).

226. See James Nicholas Boevig, Note, *Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 COLUM. J. TRANSNAT'L L. 557, 567 (2005) ("[T]he Security Council has rarely characterized such acts as aggression.").

227. See, for example, the string of resolutions condemning the actions of Southern Rhodesia and South Africa against Angola, Zambia and Lesotho as acts of aggression. See, e.g., S.C. Res. 326, U.N. Doc. S/RES/326 (Feb. 2, 1973) (S. Rhodesia); S.C. Res. 387, U.N.

These aggression determinations, however, at times employed somewhat ambiguous or inconclusive rhetoric.²²⁸ Sometimes members of the P-5 abstained in these determinations;²²⁹ on other occasions, the target state was an easily condemned pariah.²³⁰ In addition, it is unlikely that all of these examples would qualify as aggression under the ICC definition.²³¹ In any case, there were as many, if not more, counter-examples, in which the Council failed to condemn conduct that would arguably fit the definition of aggression in Resolution 3314,²³² even in situations that did not implicate one of the P-5 or a key ally.²³³ This haphazard practice was cited as evidence that

Doc. S/RES/387 (Mar. 31, 1976) (S. Africa). *See generally* HISTORICAL REVIEW, *supra* note 213, at 225–36 (compiling resolutions).

228. For example, in some of the instances the reference to aggression appeared in the preamble rather than the main text of the resolution. *See, e.g.*, S.C. Res. 386, U.N. Doc. S/RES/386 (Mar. 17, 1976) (S. Rhodesia). In the alternative, the term was used as an adjective rather than a noun. *See, e.g.*, S.C. Res. 527, U.N. Doc. S/RES/527 (Dec. 15, 1982) (South Africa).

229. *See, e.g.*, S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988) (U.S. abstention in a resolution against Israel regarding an assassination in Tunisia); S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985) (U.S. abstention on resolution condemning Israeli attack on PLO headquarters in Tunisia). On the Israeli PLO raid, *see* William E. Smith, *Israel's 1500-Miles Raid*, TIME (Oct. 14, 1985), <http://www.time.com/time/magazine/article/0,9171,960108,00.html>. On the assassination, for which Israel did not claim responsibility, *see* Jill Smolowe, *Gunned Down in Tunis*, TIME, Apr. 25, 1988, <http://www.time.com/time/magazine/article/0,9171,967236,00.html>.

230. *See supra* note 227 (resolutions against Southern Rhodesia and South Africa).

231. *See, e.g.*, S.C. Res. 611, ¶ 1, U.N. Doc. S/RES/611 (Apr. 25, 1988) (condemning Israeli assassination in Tunisia); S.C. Res. 405, ¶ 2, U.N. Doc. S/RES/405 (Apr. 14, 1977) (condemning private mercenary attacks in Benin).

232. Rarely raised publicly, but nonetheless on the forefront of diplomats' minds, were two events: first, the 2003 invasion of Iraq by the United States and its coalition partners; and second, the 2008 conflict in South Ossetia, Georgia, which involved the deployment by Russia of troops, bombing raids, and a partial occupation of Georgia. Neither of these incidents provoked Council action. The Iraqi invasion did, however, give rise to a joint declaration by Russia, Germany and France calling for avenues short of war to be pursued. Joint Declaration by Russia, Germany and France on Iraq (Feb. 10, 2003), *available at* <https://pastel.diplomatie.gouv.fr/editorial/actual/ael2/bulletin.gb.asp?liste=20030211.gb.htm>. The Security Council resolutions surrounding the war in Iraq are compiled here: *UN Security Council Resolutions Relating to Iraq*, CAMPAIGN AGAINST SANCTIONS IN IRAQ, <http://www.casi.org.uk/info/scriraq.html> (last visited Mar. 26, 2011).

233. The most oft-cited example was the invasion of Kuwait by Iraq, which was deemed “a breach of international peace and security” rather than an act of aggression. S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990). The Council never denounced Turkey's action in Cyprus as aggression *per se* either, although arguably Resolution 3314 would have supported such a determination. Both situations did, however, receive Council

the Council could not be trusted to make unbiased, principled or even consistent aggression determinations. It was argued that the Council would be paralyzed by political dissension, which would, in turn, immobilize the court.²³⁴

This criticism of the Council's past practice, while warranted in some circumstances, failed to acknowledge that there are situations in which the Council might decline to make an aggression determination on the particular circumstances of a situation, rather than on self-serving grounds.²³⁵ For example, the Council might decline to make an aggression determination following a minor international scuffle that might best be resolved through diplomacy without Council action.²³⁶ On the opposite end of the spectrum, there may be situations where a Council aggression determination might escalate tensions, as in the volatile Middle East or on the nuclearized Korean Peninsula. The Council may likewise avoid an aggression determination in conflicts without a clear first mover responsible for launching or escalating the dispute²³⁷ or where there are multiple states that might be in both aggressive and aggressed postures, as in central Africa.²³⁸ In addition, there may be situations, including those involving acts of terrorism by putative non-state actors, where state attribution is difficult on either evidentiary or political grounds, or is only possible with reference to classified information. In these cases, the Council (if it

condemnation. See S.C. Res. 353, ¶¶ 3–4, U.N. Doc. S/RES/353 (July 20, 1974) (demanding an end to foreign intervention in Cyprus and the withdrawal of foreign troops).

234. June 2005 SWGCA Report, *supra* note 20, ¶¶ 63–74.

235. Scheffer, *supra* note 148, at 901 (noting that the Security Council may decline to make a determination on aggression as part of its strategy for managing a particular conflict).

236. Examples where the Council did not intervene include the 1977 Egypt/Libya War; the 1981 Ecuador/Peru border incident; the 1985 Agacher Strip Incident between Burkina Faso and Mali; the 2009 Thailand/Cambodia border standoff; and the 2009 Colombia/Venezuela abduction incident.

237. In these mutuality cases, to the extent that the conflict is addressed, the Council takes a “pox on both your houses” approach. Examples include the Iran/Iraq War (*see, e.g.*, S.C. Res. 514, U.N. Doc. S/RES/514 (July 12, 1982) and subsequent resolutions from 1982 to 1987); the Eritrea/Ethiopia War (*see, for example*, S.C. Res. 1177, U.N. Doc. S/RES/1177 (June 26, 1998) and subsequent resolutions from 1998 to 2000); and the conflict in Nagorno-Karabakh pitting Azerbaijan against Armenia (*see, e.g.*, S.C. Res. 822, U.N. Doc. S/RES/822 (Apr. 30, 1993)).

238. *See, e.g.*, S.C. Res. 1778, U.N. Doc. S/RES/1778 (Sept. 25, 2007) (approving the deployment of an international force in eastern Chad and the northeastern region of the Central African Republic); S.C. Res. 1861, U.N. Doc. S/RES/1861 (Jan. 14, 2009) (raising concerns about the situation in central Africa).

even addresses the situation) often condemns the act of violence without identifying any responsible state.²³⁹ Finally, of course, there are situations in which an act of violence might violate the UN Charter if analyzed solely on legal grounds but which might otherwise be deemed legitimate, desirable or justified. These situations might provoke a rebuke by the Council but no sanction.²⁴⁰ In any case, past practice will be of limited use in predicting future Security Council behavior under the new ICC regime, since no previous determination that some state party committed an act of aggression had the talismanic status that will exist if and when the amendment denominated Article 15bis is activated. The Council filter was, in short, relatively straightforward but distrusted.

2. Alternative Filters: The International Court of Justice and the General Assembly

The other external filters under consideration—the International Court of Justice and the General Assembly—presented their own problems. Although the ICJ has never condemned a state for committing aggression *per se*, even in the most compelling of circumstances,²⁴¹ there is general agreement that it could do so as a the-

239. See, e.g., S.C. Res. 1319, U.N. Doc. S/RES/1319 (Sept. 8, 2000) (calling on Indonesia to disband militia active in Timor-Leste); S.C. Res. 496, ¶ 2, U.N. Doc. S/RES/496 (Dec. 15, 1981) (condemning mercenary attacks in the Seychelles often attributed to South Africa). In December 2008 following the Mumbai attack, a special committee of the Security Council added the group Lashkar-E-Tayyiba to the list of terrorist organizations established by Council Resolution 1267, but otherwise did not implicate Pakistan in the attack. See S.C. Res. 1822, ¶ 1, U.N. Doc. S/RES/1822 (June 30, 2008) (setting forth additional state obligations vis-à-vis listed groups and individuals); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); 1267 Comm., The Consolidated List Established and Maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them (Feb. 9, 2011), <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>.

240. Examples include the 1998 intervention in Kosovo, the 1981 attack by Israel against Iraqi reactors (see, e.g., S.C. Res. 487, ¶ 4, U.N. Doc. S/RES/487 (June 19, 1981)); and the United States's attacks on Sudan and Afghanistan after the 1998 embassy bombings. See generally Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999), Ved P. Nanda, *NATO's Armed Intervention in Kosovo and International Law*, 10 U.S. AIR FORCE ACAD. J. LEGAL STUD. 1 (1999/2000).

241. Even in the *Armed Activities in the Congo* case—where Uganda launched an invasion and air attacks and eventually occupied parts of the territory of the Democratic Republic of Congo—the court did not find aggression *per se*. *Armed Activities on Territory*

oretical matter if confronted with the right facts.²⁴² Logistical problems, though, loomed large with respect to a potential ICJ filter. In particular, it was unclear if the ICJ would make the necessary determination pursuant to its advisory or contentious jurisdiction—neither of which provides a clean or particularly efficient option. Activating the contentious jurisdiction would likely require all relevant states²⁴³ to have accepted the compulsory jurisdiction pursuant to Article 36(2) of the ICJ Statute.²⁴⁴ These States Parties could potentially refer a matter *inter partes* that might require an aggression determination by the ICJ pursuant to Article 36(1) of the ICJ Statute.²⁴⁵ The relevant States Parties may also have been parties to unrelated bilateral treaties—such as friendship, commerce and navigation treaties—that designate the ICJ as the arbiter of any dispute arising out of the interpretation or application of the treaty. In the past, such treaties

of Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 227 (Dec. 19) (holding the “obligations arising under the principles of non-use of force and non intervention [were] violated by Uganda” and concluding that Uganda’s conduct constituted a “grave violation of the prohibition on the use of force expressed” in Article 2(4)).

242. See Kari M. Fletcher, *Defining the Crime of Aggression: Is There an Answer to the International Criminal Court’s Dilemma?*, 65 A.F. L. REV. 229, 252–53 (2010); Troy Lavers, *[Pre]determining the Crime of Aggression: Has the Time Come To Allow the International Criminal Court Its Freedom?*, 71 ALB. L. REV. 299, 311 (2008).

243. See, e.g., *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K., N. Ir. & U.S.), 1954 I.C.J. 19, 32 (June 15). The *Monetary Gold* case might be read to require all states involved in a putative act of aggression to have accepted the court’s contentious jurisdiction before the court could have exercised any filter function assigned to it. *But see* *Legality of Use of Force* (Yugo. v. Belg.), 1999 I.C.J. 124, 140 (June 2); *Legality of Use of Force* (Yugo. v. Can.), 1999 I.C.J. 259, 274 (June 2); *Legality of Use of Force* (Yugo. v. Fr.), 1999 I.C.J. 363, 374 (June 2); *Legality of Use of Force* (Yugo. v. Ger.), 1999 I.C.J. 422, 433 (June 2); *Legality of Use of Force* (Yugo. v. It.), 1999 I.C.J. 481, 493 (June 2); *Legality of Use of Force* (Yugo. v. Neth.), 1999 I.C.J. 542, 558 (June 2); *Legality of Use of Force* (Yugo. v. Port.), 1999 I.C.J. 656, 672 (June 2); *Legality of Use of Force* (Yugo. v. Spain), 1999 I.C.J. 761, 774 (June 2); *Legality of Use of Force* (Yugo. v. U.K.), 1999 I.C.J. 826, 840 (June 2); *Legality of Use of Force* (Yugo. v. U.S.), 1999 I.C.J. 916, 926 (June 2) (allowing case to go forward against other members of NATO in the absence of Spain and the United States, which had lodged reservations to Article IX of the Genocide Convention on which Serbia & Montenegro had premised jurisdiction).

244. Sixty-six such declarations have been lodged with the court. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Apr. 1, 2011).

245. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

have provided jurisdiction in contentious cases involving uses of force.²⁴⁶

The ICJ's advisory jurisdiction is limited by Article 65(1) of the ICJ Statute to "any legal question."²⁴⁷ Arguably, a determination of whether a particular state engaged in an act of aggression presents a host of quintessentially factual questions given all the variables involved. At the same time, the ICJ has interpreted this language rather loosely by noting that a question relating to "the legal consequences arising from a given factual situation" under the rules and principles of international law remains a legal question.²⁴⁸ As a result of this approach, several of the ICJ's advisory opinions have been criticized as disguised contentious cases.²⁴⁹ The ICJ has even issued advisory opinions in situations in which it pronounced upon the legal obligations and compliance of states not subject to the ICJ's compulsory jurisdiction.²⁵⁰ That said, the ICJ acknowledges the relevance of state consent vis-à-vis its advisory jurisdiction but suggests that it is apposite to the propriety of the ICJ's exercise of jurisdiction rather than its legal competence to do so.²⁵¹

The ICJ may give an advisory opinion at the request of the organs of the United Nations, including the General Assembly or the Security Council, or specialized agencies authorized to make such a request with the caveat that the request must fall within the scope of activity of the requesting entity.²⁵² The most likely source of a request for an advisory opinion on the crime of aggression would have inevitably been either the Council or the Assembly. The use of the

246. See, e.g., *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6) (basing jurisdiction on the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran).

247. ICJ Statute, *supra* note 245, art. 65.

248. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 153 (July 9). In that case, the court at the request of the General Assembly declared that parts of the wall built by Israel violated international law. The court had to find a number of facts in connection with this opinion, many of them adverse to Israel, which had not consented to the court's jurisdiction.

249. See Sean Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62, 74 (2005).

250. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136.

251. *Id.* at 157–58.

252. See generally Dapo Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, 9 EUR. J. INT'L L. 437 (1998) (discussing the court's advisory jurisdiction and critiquing the court's approach in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8)).

term “may” in Article 65(1) of the ICJ Statute also indicates that the ICJ is not required to give an advisory opinion when asked.²⁵³ Only “compelling reasons,” however, should lead the ICJ to refuse to give such an opinion,²⁵⁴ and the ICJ has never declined an advisory opinion on this discretionary basis.²⁵⁵ Perhaps now that the ICJ’s docket is well-filled, it will be less inclined to accept requests for advisory opinions, although it would likely have been hard pressed to reject a request when the work of the ICC depended on the resolution of the question posed.²⁵⁶ As a practical matter, there is no way to force implicated States Parties to participate in, or assist, any such proceedings before the ICJ.²⁵⁷

For its part, the General Assembly filter—though deemed a more “democratic” solution by some²⁵⁸—received only tepid support.²⁵⁹ Assuming the Charter could be read to authorize a General

253. *Wall*, Advisory Opinion, 2004 I.C.J. at 156 (“the Court has discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.”).

254. *Id.*

255. The one time the court declined to give an advisory opinion was on jurisdictional grounds in response to a 1993 request by the World Health Organization, which sought an opinion on the legality of nuclear weapons. The court ruled that the subject matter of the request was outside the scope of the WHO’s activities. The General Assembly then submitted the same question to the court a year later in Resolution 49/75K (Dec. 15, 1994), and the court proceeded to issue the requested opinion. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8). The Permanent Court of Justice, by contrast, did in one case decline to give an Advisory Opinion in a matter based on “the very particular circumstance of the case, among which were that the question directly concerned an already existing dispute” and one of the parties objected to the proceedings and refused to take part in any way. *See Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 235 (referring to *Status of Eastern Carelia*, 1923 P.C.I.J. (series B) No. 4). In the *Wall* Advisory Opinion, however, the court noted that “the lack of consent to the Court’s contentious jurisdiction by interested States had no bearing on the Court’s jurisdiction to give an advisory opinion.” *Wall*, Advisory Opinion, 2004 I.C.J. at 157. In this regard, *Eastern Carelia* may be said to have been effectively overruled, or at least confined to its facts, in favor of a form of *de facto* compulsory advisory jurisdiction.

256. *See* Beth Van Schaack, *International Court of Justice Roundup*, INTLAWGRRLS (FEB. 28, 2011), <http://intlwgrrls.blogspot.com/2011/02/international-court-of-justice-round-up.html> (discussing current docket).

257. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Written Statement of the Government of Israel on Jurisdiction and Propriety (Jan. 30, 2004) (declining to discuss merits of the advisory opinion on the grounds that the Court does not have jurisdiction to entertain the request for an advisory opinion), available at <http://www.icj-cij.org/docket/files/131/1579.pdf>.

258. Schaeffer, *supra* note 109, at 432.

259. *See* Trahan, *supra* note 80, at 62 (noting loss of support for General Assembly filter).

Assembly filter process as a function of the Assembly's recommendatory powers,²⁶⁰ the specter of politicization loomed large with this option. While many participants argued that a Security Council filter would indelibly politicize the court, others argued that assigning any role to the General Assembly in an aggression prosecution would render the proceedings equally if not more politicized (and potentially paralyzed) given the fractious nature of that body.²⁶¹

Although these alternative filters appeared to present points of potential compromise, the principles underlying the positions of the P-5 and the proponents of an independent ICC were ultimately irreconcilable. Indeed, if there was any collective red line amongst the P-5's diverse set of interlocutors it was that the ICC must remain liberated from Security Council control beyond Article 16, even in the context of the crime that touches most closely on the Council's prerogatives.²⁶² For their part, the P-5 viewed any erosion of exclusivity as an end run around the UN Charter and the veto power.²⁶³

This debate, which occurred against the backdrop of a persistent yet faltering Security Council reform movement,²⁶⁴ surfaced in intense antipathy toward the Council.²⁶⁵ Although the Chair and President retained Alternative 1 (the exclusive Security Council filter) in Article 15bis until the final days of the negotiations in Kampala, this was due solely to the status of the states advocating it and not because Alternative 1 enjoyed any sort of broad-based support among

260. See *supra* text accompanying note 213.

261. See Benjamin B. Ferencz, *Enabling the International Criminal Court To Punish Aggression*, 6 WASH. U. GLOB. STUD. L. REV. 551, 563 (2007).

262. See also Int'l Criminal Court, Assembly of States Parties, Resumed 5th Sess., Jan. 29–Feb. 1, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶ 25, U.N. Doc. ICC-ASP/5/35, Annex II (2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-35_English.pdf (recounting arguments as to the importance of ensuring the court's independence from political bodies).

263. *Id.* ¶ 26.

264. See U.N. Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, U.N. Doc. A/59/565 (Dec. 2, 2004), at ¶¶ 244–65; see generally BARDO FASSBENDER, UNITED NATIONS SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE (1998) (discussing Security Council reform proposals).

265. Brazil, which happened to hold a rotating spot on the Security Council while these debates were ongoing in Kampala, has been a leader in this effort, but it undercut its credibility at the Conference by virtue of its vote against Iranian sanctions. See S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

negotiating parties.²⁶⁶ In the end, the Chair and President could not credibly include Alternative 1 in the final Non-Paper or package without provoking a collective backlash that would likely have sunk the negotiations. By holding out the possibility of an exclusive Security Council filter until the last minute, the Chair and President kept the P-5 engaged and set the stage for them to accept as consolation prizes the opt-out clause and the exclusion of Non-Party States from the aggression provisions.²⁶⁷

While the elimination of an exclusive Security Council filter in Article 15bis was not a surprise, it was somewhat unexpected in Article 15ter, addressing Security Council referrals. The record does not disclose which state proposed this change.²⁶⁸ None of the P-5 spoke out for or against it in public, even though it removed a Council control mechanism. Without such a filter, it is unlikely that the Security Council will refer a situation involving acts of aggression to the court if it does not also support the leveling of aggression charges (or at least accept their possibility). This lack of a filter power threatens to reduce Security Council referrals, diminish the role of the Council in the work of the ICC and thus potentially reduce the number of cases coming before the court involving other core crimes in addition to aggression. There may especially be a reduction in cases involving Non-Party States, which can only be triggered by the Council. This result may have been the purpose of removing the filter in Article 15ter all along. It remains to be seen whether the Council will attempt to use its remaining control mechanisms to constrain the Prosecutor's ability to bring aggression charges to the court.

B. Existing Security Council Control Mechanisms

The ICC is already subject to significant Security Council control, both in terms of the Council's power to refer situations involving Non-Party States under Article 13(b) and in deferring prose-

266. Wenaweser, *supra* note 51, at 886 (noting the inevitability of an alternative filter in the event of Security Council inaction).

267. *Id.* (noting also that the specific reference to Article 16 of the Statute and the delayed activation of the amendments altogether were also aimed at placating the P-5).

268. Barriga and Glover note only that the idea was put to the President in bilateral consultations. Barriga & Glover, *supra* note 98, at 11.

cutions in a situation altogether under Article 16.²⁶⁹ The latter provision demonstrates that the principle of separation of powers is already imperfectly incorporated in the ICC Statute. Adding the crime of aggression to the court's subject matter jurisdiction promised to revive and indeed sharpen debates about the optimum balance between Security Council hegemony in situations involving threats to and breaches of the peace and the principle of judicial independence. Some states offered an additional control mechanism for the Security Council in the form of the red light proposal, which would have empowered the Council to reject *ex ante* any aggression charges while allowing other charges to go forward to ensure some measure of accountability for international crimes committed in a particular situation. Nonetheless, the final amendments add nothing to the Council's textual ability to control which charges the Prosecutor may bring in any particular situation.

None of the factions in Kampala rallied behind the red light option.²⁷⁰ Although the proposal was seemingly offered as a concession to the Security Council to give it more flexibility than Article 16, the P-5 rejected the offering given that it was pitched as a check on a Pre-Trial Chamber filter and an alternative to an exclusive Security Council filter. Although the P-5 might have preferred an additional red light function rather than having to fall back on the power already vested in them by Article 16,²⁷¹ they could not express support for such a provision without undermining their principled arguments on Council exclusivity. Even though the red light proposal seemed at first glance to respect, if not enhance, the Security Council's powers, it still raised the potential for inconsistent pronouncements by pitting a political body against a judicial one at the very time that the international community should be united against an act of aggression. The timing of the proposed red light function was

269. Article 13 allows the Security Council to refer a situation to the court. *See supra* note 69. Article 16 allows the Council to defer a prosecution for one year. *See supra* note 26.

270. Coracini, *supra* note 42, at 762 (noting elimination of the red light option); *see also* Int'l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess., Nov. 14–22, 2008, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 21–22, U.N. Doc. ICC-ASP/7/20, Annex III (2008), available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-7-20-Ann.III%20English.pdf (describing limited support for the red light proposal).

271. The Council veto would have operated similarly under both the red light function and an Article 16 deferral: a single veto would allow a prosecution to go forward. Presumably, however, it would have been more difficult to invoke the red light considering its more permanent nature.

such that it would force a matter onto the Council's agenda six months or so after the events in question. The concern was that this could divert the Council from its response to that particular threat to the peace as well as from other emergent crises. The ABS coalition for its part objected to giving the Security Council another control mechanism that could stymie aggression prosecutions.²⁷² With neither side in support, the proposal ultimately fell away.²⁷³

And so, the Council's only control mechanisms over aggression prosecutions are those already found in Article 13(b) and Article 16. Article 16 at first glance appears to be a rather blunt instrument for the Security Council to influence what charges may be brought before the court in a particular situation, since by its terms it seems to result in the deferral of the investigation and prosecution of an entire situation altogether rather than operating as a line item veto.²⁷⁴

272. See Int'l Criminal Court, Assembly of States Parties, Official Records on its 7th Sess., Nov. 14–22, 2008, *Report of the Special Working Group on the Crime of Aggression*, ¶ 22, U.N. Doc. ICC-ASP/7/20, Annex III (2008), available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-7-20-Ann.III%20English.pdf.

273. As an alternative to the red light proposal, former Ambassador for War Crimes, David Scheffer, advanced a proposal in Kampala that was premised on three potential actions by the Security Council: an affirmative determination of an act of aggression; a negative determination of an act of aggression; and no determination of whether or not an act of aggression was committed. In the event of an affirmative or positive determination, the filter would allow an aggression prosecution to proceed. In the event of a negative determination, the filter would operate to block an aggression prosecution from proceeding. The Pre-Trial Chamber would act as a filter only in the event that the Council did not make a determination of either character. The proposed language read as follows with changes to the Chair's Non-Paper in bold and strike through:

(4)**bis** Where no ~~such~~ determination **of either character** is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15 **unless the Security Council has directed otherwise.**

Ambassador Scheffer's Proposal (on file with the author).

Under Ambassador Scheffer's model, the Council would then have a second red light opportunity to block the prosecution. The proposal raised complex questions of Council practice, particularly with respect to the voting rules. In particular, the model seemed to contemplate too many scenarios that would allow the Pre-Trial Chamber to serve as the filter (as where neither a negative nor a positive determination was made) to be acceptable to the P-5. See generally Scheffer, *supra* note 148, at 901–02 (discussing his proposal in Kampala).

274. See M. CHERIF BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT 132 (2005) (arguing that the Council can only suspend the prosecution of an entire situation). Murphy notes that Article 16 also requires the Council to extend a benefit to a potential aggressor state at the

Nonetheless, the intense controversy²⁷⁵ surrounding Security Council Resolutions 1422²⁷⁶ and 1487²⁷⁷ suggests that the Council might at

exact point when the Council is trying to bring that state back into compliance. Sean Murphy, *The Crime of Aggression As Adopted by the ICC First Review Conference: A Step Forward?* 12 (Oct. 15, 2010) (unpublished manuscript).

275. See El Zeidy, *supra* note 26, at 1519–23; Carsten Stahn, *The Ambiguities of Security Council Resolution 1422* (2002), 14 EUR. J. INT'L L. 85 (2003) (discussing the controversy surrounding resolution 1422).

276. In June 2002 (just shy of two weeks before the ICC Statute entered into force), the United States vetoed a peacekeeping mission in Bosnia-Herzegovina out of fear that participating U.S. nationals would be subjected to prosecution for war crimes before the ICC (even though the International Criminal Tribunal for the former Yugoslavia would likely have had primary jurisdiction). At this time, the United States sought passage of a Chapter VII resolution that would have imposed a permanent bar on the prosecution of any United States peacekeeper in Bosnia-Herzegovina, but the resolution did not garner support. Detractors argued that the proposed resolution was *ultra vires* under the Charter in the absence of an extant threat to the peace, amounted to an unlawful revision of Article 16 (which is ostensibly meant to be used on a case-by-case basis after an investigation has begun) and undermined the credibility of the Council and the integrity of the ICC. The United States then sponsored a resolution invoking Article 16 and exempting all United Nations peacekeepers *ex ante* from ICC jurisdiction for one year. S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002). The operative language of Resolution 1422 is:

1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise. . . .

See U.N. SCOR, 57th Sess., 4568 mtg., U.N. Doc. S/PV.4568 (July 10, 2002), available at <http://www.un.org/Docs/pv4568e.pdf> and <http://www.un.org/Docs/pv4568e1.pdf> (Security Council debates); see also Bryan MacPherson, *Authority of the Security Council To Exempt Peacekeepers from International Criminal Court Proceedings*, ASIL INSIGHTS (July 2002), <http://www.asil.org/insigh89.cfm> (discussing the controversy over the legality of Resolution 1422). The Bosnian peacekeeping mission was thereafter immediately renewed. See S.C. Res. 1423, U.N. Doc. S/Res/1423 (July 12, 2002).

277. S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003) (renewing Resolution 1422 with abstentions by France, Germany and Syria). Resolution 1487 was not renewed a year later because it expired right as photographs from Abu Ghraib began to be released, and it was clear that the United States could not garner the political support it would need in the Council to extend Resolution 1422 again. See Marco Roscini, *The Efforts to Limit the International Criminal Court's Jurisdiction over Nationals of Non-Party States: A Comparative Study*, 5 LAW & PRAC. INT'L CTS. & TRIBS. 495, 500 (2006). Similarly, resolution 1497 authorized the establishment of a multinational force in Liberia and provided that "current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless

some point attempt to use its Article 16 power²⁷⁸ (and perhaps its Article 13(b) referral power for that matter²⁷⁹) more surgically to dictate which charges may be brought in particular situations or cases.²⁸⁰ It remains to be seen to what extent the terms of the ICC Statute constrain the Council's exercise of its Chapter VII powers and whether the court would override the Council's preference that no aggression charges be considered within a particular situation.²⁸¹

such exclusive jurisdiction has been expressly waived by that contributing State." S.C. Res. 1497, ¶ 7, U.N. Doc. S/Res/1497 (Aug. 1, 2003).

278. Besides the two peacekeeping resolutions, the Council has yet to invoke Article 16 as it was originally conceived. Efforts to convince the Council to defer the prosecution of Sudanese President Al Bashir did not bear fruit. See Press Release, Security Council, International Criminal Court Prosecutor Says Security Council Should Be Prepared for "United Action" To Ensure Execution of Sudanese President's Arrest Warrant, U.N. Doc. SC/9516 (Dec. 3, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9516.doc.htm> (discussing debates about potential deferral).

279. When the Security Council referred the situation in Darfur to the court in Resolution 1593 (2005), it also added language to the effect that any nationals from a Non-Party State involved in Sudan would be subject to the exclusive jurisdiction of the contributing state. "The inclusion of this paragraph constituted the price to pay in order to secure the abstention of the US in the [referral] vote." Roscini, *supra* note 277, at 501 n.12.

280. See Scheffer, *supra* note 148, at 904 (arguing that the Council may make targeted aggression referrals); see also Negotiated Relationship Agreement between the International Criminal Court and the United Nations, art. 2(1), U.N. Doc. ICC-ASP/3/Res.1 (July 22, 2004), available at http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf (confirming the independence of the court). But see Luigi Condorelli & Santiago Villalpando, *Can the Security Council Extend the ICC's Jurisdiction?*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 572 (Antonio Cassese et al. eds., 2002) (arguing that the Relationship Agreement between the ICC and the United Nations precludes the Council from extending the jurisdiction of the court).

281. See U.N. Charter art. 125 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."); *id.* art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."). Although these articles technically only apply to states and not to international organizations with separate legal personality, it could be argued that the court is ultimately a creature of states acting collectively. See Nigel White & Eric Myjer, *Editorial*, 7 J. CONFLICT & SECURITY L. 145, 145 (2002).

C. State Consent

Both the opt-out and Non-Party State exclusion provisions are premised on the principle of state consent, the defining feature of Box 3 and a component of Box 1. Both Boxes require a showing that the putative aggressor state had ratified or accepted the aggression amendments. This concept eventually rose to the forefront of the negotiations as an appealing way to limit the court's ability to exercise jurisdiction over the crime of aggression without further privileging the Security Council or forsaking aggression prosecutions to power politics. It was always assumed that the Security Council could refer a situation involving potential aggression charges to the court independent of whether the relevant state(s) were parties to the Statute or had accepted the aggression amendments. But the question of state consent became an issue insofar as non-Security Council triggers and filters were under consideration. In many respects, the debates over the appropriate entry into force provisions were really proxy arguments about consent given the strong legal and textual arguments in favor of the Negative Understanding of Article 121(5). This Understanding was premised on state consent because it provided that additions to the Statute would not apply to the nationals of states that did not ratify or accept the amendments.

The theory espoused by proponents of Box 3 for requiring state consent was that the crime of aggression implicates state sovereignty more than any of the other three crimes because a state's act of aggression serves as a predicate for the prosecution of an individual for the crime of aggression.²⁸² None of the other ICC crimes is so dependent on state action. Although it may be the product of a state policy, genocide may also be committed by private individuals.²⁸³ War crimes occurring in international armed conflicts will have likely been committed by agents of the state, but most of the same crimes are also prosecutable when committed by non-state actors in the context of a non-international armed conflict.²⁸⁴

282. *But see* Amann, *supra* note 70, at 191–93 (arguing that the three original ICC crimes implicate state sovereignty as well).

283. Convention on the Prevention and Punishment of the Crime of Genocide art. 4, adopted by G.A. Res. 260 (III), U.N. Doc. A/RES/260(III) (Dec. 9, 1948) (“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”); *see* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons) (June 1, 2001) (discussing genocide charges against businessmen).

284. *See* ICC Statute, *supra* note 3, art. 8. Given the almost complete convergence of war crimes committed in international and non-international armed conflicts, conflict

Even when war crimes are committed by state actors, however, the state is not directly implicated in any element of the crime other than the circumstantial element concerned with the classification of the conflict, although the court is encouraged to focus on those war crimes that are in fact part of a “plan or policy or as part of a large-scale commission of such crimes.”²⁸⁵ A prosecution for crimes against humanity as that offense is formulated in the ICC Statute implicates state action the most: a conviction requires proof that a state or organization was acting pursuant to a plan or policy against a civilian population.²⁸⁶ Nonetheless, the perceived exceptionality of the crime of aggression as a function of state action supported arguments in favor of premising jurisdiction on state consent.

The centrality of the determination of a state act of aggression to a prosecution for the crime of aggression invokes a foundational principle governing the jurisdiction of international adjudicative organizations. This was first articulated in *Monetary Gold*²⁸⁷ and later

classification has become virtually irrelevant from the perspective of penal responsibility for all but a handful of war crimes. This convergence was tightened in Kampala with the adoption of the Belgian amendment to Article 8, which allowed certain weapons crimes to be prosecuted in non-international armed conflicts for the first time. See Res. RC/Res.5 (June 10, 2010), U.N. Doc. RC/Res.5, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf.

285. ICC Statute, *supra* note 3, art. 8(1).

286. Article 7(3) of the ICC Elements of Crimes states that

“[a]ttack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.

International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27/pdf/N0072427.pdf?OpenElement>.

287. *Monetary Gold Removed from Rome in 1943* (It. v. U.S., U.K. & Fr.), 1954 I.C.J. 19 (June 15). In *Monetary Gold*, the ICJ was asked to determine whether the United Kingdom or Italy had a superior claim to Albanian gold that had been held by Italy but seized by Germany during World War II. Italy claimed the gold as reparations for damage done by Germany; the United Kingdom sought the gold for the partial execution of the ICJ’s *Corfu Channel* judgment. However, Albania was not a party to the case before the ICJ. In dismissing the case, the ICJ ruled that international tribunals cannot adjudicate a matter in which the very subject matter of the dispute involves the legal interests of states that are not before it. Albania would not have been bound by any judgment had the ICJ reached the merits; nonetheless, the ICJ held that Albania was a necessary and indispensable party to the proceedings, as its legal interests in the matter would have been sufficiently implicated.

re-affirmed in the *Case Concerning East Timor*.²⁸⁸ According to this principle, an international tribunal is not competent to pronounce upon the rights and duties of states absent their consent.²⁸⁹ In other words, a state cannot be forced to submit to international jurisdiction.²⁹⁰ To be sure, it might be argued that the principle does not apply to international criminal tribunals, such as the ICC, that do not strictly assert jurisdiction over states.²⁹¹ Indeed, the Nuremberg and Tokyo Tribunals pronounced on acts of aggression committed by Germany and Japan, although the definition of crimes against the peace did not technically require such a determination.²⁹² Neither

288. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90 (June 30). In *East Timor*, the ICJ was asked to invalidate a treaty between Australia and Indonesia, which had purported to resolve questions surrounding sovereignty over the Timor Gap. Indonesia had been occupying Timor-Leste since 1975. Portugal—claiming to be exercising its duties as the administering power of Timor-Leste—argued that Indonesia’s unlawful occupation of the island precluded Australia from entering into a treaty with Indonesia concerning Timorese resources. Rather, Portugal argued that only the administering power could enter into treaties on Timor-Leste’s behalf. Australia had recognized the *de facto* incorporation of Timor-Leste into Indonesia since 1978, although it had a standing objection to the manner in which the incorporation was effectuated. Australia argued that in addressing Portugal’s claims, the ICJ would be required to rule on the lawfulness of Indonesia’s entry into and continuing presence in Timor-Leste. The court declined to rule on Portugal’s claims, holding that to do so would require it to pronounce upon the legality of the initial use of force by Indonesia, a state not before the ICJ.

289. See generally Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council* (May 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806. Akande makes a connection between the consent principle and the necessity of a Security Council trigger or exclusive referral in the context of a situation in which the actions of non-consenting states serve as the predicate to a prosecution for the crime of aggression. He frames his Council-exclusivity argument not on the imperative of ensuring consistency with the Charter framework but rather as a function of ensuring that the ICC is in compliance with legal rules governing the jurisdiction of international judicial institutions generally. In other words, a Council override of state consent goes to the very foundations of judicial competence. In his view, having a Council filter (and indeed, he goes further to suggest that there should be an exclusive Council trigger for aggression) actually serves to expand the power of the ICC by essentially getting around the *Monetary Gold* principle, which would otherwise constrain the court when the conduct of non-consenting states is at issue.

290. In Alien Tort Statute litigation, United States courts have made clear that political leaders can be sued in their individual capacity, and the state is not a necessary or indispensable party that must be joined.

291. See Akande, *supra* note 289.

292. See London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (defining “crimes against the peace” as the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or

Tribunal enjoyed the consent of the aggressor state, unless Japan and Germany can be considered to have constructively consented to jurisdiction by virtue of their defeat, subjugation and occupation.²⁹³ Nonetheless, where an aggression prosecution is directly premised on a determination of state action, the *Monetary Gold* principle seems highly relevant.

Arguably, all states implicated in an act of aggression, as either aggressors or victims, would need to have consented for the ICC to have jurisdiction.²⁹⁴ This might require the consent of a number of states involved in coalition warfare. Indeed, the aggression negotiations were always premised on a rather artificial classic binary conflict, with a clear aggressor and aggressed state. This simplistic model ignores the fact that many conflicts involving coalitions on both sides²⁹⁵ lack a proverbial first mover or may position states in both aggressive and aggressed postures, such as in the Great Lakes region of Africa. The ICC will have to determine which states' consent is required before any aggression prosecution goes forward.

The imperative of state consent vis-à-vis prosecutions for the crime of aggression is especially compelling given that there is no apparent mechanism for the aggressor state to intervene in a criminal prosecution before the ICC (except in the complementarity phase,²⁹⁶

participation in a common plan or conspiracy for the accomplishment of any of the foregoing").

293. Akande, *supra* note 289. Akande notes that it could be argued that the post-World War II tribunals were essentially domestic occupation courts that would not be bound by the *Monetary Gold* principle. *Id.*

294. This harkens back to the classic *si omnes* clauses of the international humanitarian law treaties of yesteryear. See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 24, July 6, 1906, available at <http://www.icrc.org/ihl.nsf/FULL/180?OpenDocument> ("The provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention"). The Nuremberg Tribunal rejected the application of the *si omnes* clause in Article 2 of the 1907 Hague Convention on the ground that the treaty's provisions constituted customary international law and were thus binding on non-signatories on that basis. Nuremberg Judgment, *supra* note 8, at 248–49 ("But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war,' which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in art. 6(b) of the Charter.").

295. See Patricia A. Weitsman, *Wartime Alliances Versus Coalition Warfare: How Institutional Structure Matters in the Multilateral Prosecution of Wars*, 4 STRATEGIC STUDIES Q. 113 (Summer 2010) (discussing modern multilateral warfare).

296. ICC Statute, *supra* note 3, arts. 17–19.

where the merits of whether an act of aggression was committed have no bearing, or when an *in situ* investigation is ordered²⁹⁷). To be sure, it could be argued that there are no direct or binding implications to an ICC determination that a state has committed an act of aggression. The ruling, for example, will carry no *res judicata* effect in any subsequent inter-state adjudication. This argument ignores the expressive force of a judicial determination, which will inevitably carry great moral weight in dealings and negotiations between the relevant parties and the international community and will in any case have evidentiary significance in any subsequent inter-state dispute. Moreover, a declaration of rights standing alone is often conceived of as a remedy in international adjudications, so an aggression determination by the ICC will not be without impact.²⁹⁸

As state consent emerged as the principle around which a consensus on the aggression amendments began to coalesce, the P-5 were hard-pressed to advance counterarguments, especially given the centrality of state consent in public international law²⁹⁹ and the apparent willingness of their allies to voluntarily relinquish, or at least encumber, what may be considered core prerogatives of state sovereignty.³⁰⁰ The P-5 marshaled arguments to the effect that States Parties could not consent their way out of prior commitments to the UN

297. ICC Statute, *supra* note 3, art. 57(d)(3).

298. International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, art. 37(2) ("Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality."). *See, e.g.*, Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 35 (Apr. 9) ("the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is . . . in itself appropriate satisfaction."); Golder v. United Kingdom, App. No. 4451/70, 18 Eur. Ct. H.R. (ser. A) (1975) (treating declaratory relief as "adequate just satisfaction").

299. State consent has historically provided the basis for the formation and binding nature of international norms (as where states voluntarily join treaties, engage in state practice and articulate *opinio juris*) as well as for the jurisdiction of international institutions. *See S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("the rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. . . . Restrictions upon the independence of States cannot therefore be presumed."). *But see* Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUST. Y. B. INT'L L. 22 (1988–89) (arguing that consent does not underlie the formation of customary international law). *See generally* J. Shand Watson, *State Consent and Sources of International Obligation*, 86 AM. SOC'Y INT'L L. PROC. 108, 112 (1992) (defending classical theory).

300. *See* Amann, *supra* note 70, at 205 (noting how states relinquish power to prosecute their nationals when they create international tribunals).

Charter framework and their delegation of power and responsibility to the Security Council and its system of collective security.

This critique was premised, however, on a robust view of Security Council primacy and exclusivity in the aggression context that was weakened by subsequent United Nations practice (and the Charter itself to a certain extent).³⁰¹ It was also undermined by the opt-out regime and the determination that the aggression amendments would not apply to Non-Party States. These two developments made it difficult for the P-5 to credibly attack the amendments. The P-5 fell back on arguments that allowing states to subject themselves to an aggression regime would impede coalition building. The theory was that potential coalition partners would be subject to different degrees of exposure to prosecution before the court. They may also exhibit different levels of tolerance for the uncertainty inherent to the aggression provisions. These variations among states may make it more difficult for a single state, especially a Non-Party State, to pull together a coalition. The fact that the aggression provisions may exert a chilling effect on collective uses of force may paradoxically lead to more unilateral actions by states that are not subject to the aggression provisions. Nonetheless, this argument was not compelling enough to the other parties to overcome the obvious utility and attraction of a state consent regime.

In the face of this, the P-5 were left with arguments that the choice to accept jurisdiction was simply deontologically wrong and that States Parties should be protected from themselves—strong, and no doubt alienating, paternalistic arguments.³⁰² It could not be credibly argued that states in support of the aggression amendments were demonstrating a lack of decisional capacity. And, while there are areas in the law where we deny full agency,³⁰³ a state submitting its nationals to potential prosecution for aggression can hardly be one of

301. See *supra* text accompanying notes 211–217.

302. See Chin Liew Ten, *Paternalism—Strong Paternalism*, MILL ON LIBERTY: A VICTORIAN WEB BOOK (2001), <http://www.victorianweb.org/philosophy/mill/ten/ch7b.html> (“the practice of strong paternalism easily becomes a cloak for the imposition of our values on those who are coerced.”).

303. For example, according to Article 7 of the Third Geneva Convention governing prisoners of war, “[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.” Convention (III) Relative to the Treatment of Prisoners of War art. 7, Aug. 12, 1949, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68>; see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690) (arguing that a person cannot consent to enslavement).

them in light of the burgeoning system of international criminal justice. To be sure, the preservation of sovereignty, the maintenance of a sphere of inscrutable domestic jurisdiction and freedom from outside intervention are presumed to be shared values that historically formed the basis for the international legal order.³⁰⁴

Increasingly, however, states are voluntarily and deliberately subjecting themselves (or their nationals) to international institutions (including human rights and trade tribunals) that are collectively eroding these prerogatives.³⁰⁵ These classical sovereign values are thus giving way to other more cosmopolitan, indeed even communitarian, impulses that suggest the emergence (or at least a glimmer) of a new shared political morality. Like any system of government or institution, states involved in the aggression negotiations evinced a willingness to subject themselves to a system that will both constrain and, it is likely hoped, protect them. In the face of this trend, the P-5 had difficulty countering arguments premised on state consent.

1. The Opt Out

The opt-out provision contained in Article 15bis(4)³⁰⁶ emerged as one of the two prices to be paid by the ABS coalition for gaining the Pre-Trial Division filter in lieu of an exclusive Security Council filter in Article 15bis. Although no doubt a bitter pill for these states to swallow, it had some appeal. For one, it suggested a way to attempt to avoid the unwelcome implications of the Negative Understanding of the second sentence of Article 121(5),³⁰⁷ which was based essentially on an opt-in regime that enabled States Parties to passively avoid the aggression provisions by simply failing to ratify or accept them. The opt out seems *sub silentio* premised on a Positive Understanding of Article 121(5) since Article 15bis(4) implies

304. Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 EUR. J. INT'L L. 70, 78 (1999).

305. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) (discussing increased use of international courts to resolve international disputes).

306. See Aggression Resolution, *supra* note 1, Annex I, art. 15bis(4) ("The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.").

307. See *supra* note 78.

that the court can exert jurisdiction over any State Party that has not lodged an opt-out declaration, regardless of whether that state party has ratified or accepted the amendments.³⁰⁸ Under this interpretation of the second sentence of sub-paragraph (5), all that matters is that the putative victim state has accepted the amendments. If so, then a potential crime of aggression involving the territory of the aggressed state can come before the court regardless of whether the putative aggressor state party has ratified or accepted the amendments. As a result, and by default, would-be aggressor States Parties are bound by the amendments absent their ratification/acceptance so long as any of the putative victim states are so bound.

Under this scenario, the opt out works to overcome this default by allowing aggressor states to take affirmative action to avoid the operation of the Positive Understanding and shield their nationals from prosecution. By flipping the power of inertia in favor of jurisdiction, and requiring an affirmative act on the part of states, the opt-out clause provides an additional obstacle to those States Parties that might want to avoid the aggression provisions. It also offers a toe-hold from which elements of international and domestic civil society can mount a political shame campaign to encourage states to decline the opt-out option. This interpretation, however, does considerable violence to the plain text and logic of the amendment provisions. In effect, this would enable proponents “to avoid the super-majority requirement of Article 121(4) through use of Article 121(5), but then make use of Article 121(4)’s approach of binding States Parties that have not yet ratified or accepted the amendment.”³⁰⁹

The opt out can, of course, be made to work under the Negative Understanding of the second sentence of Article 121(5), but it does seem a bit awkward.³¹⁰ Under the Negative Understanding, the nationals of States Parties that have not ratified or accepted the amendments cannot be prosecuted for the crime of aggression. From a purely cynical perspective, there thus remains no obvious incentive

308. See Wenaweser, *supra* note 51, at 886 n.10 (noting cryptically that “[t]he final version of the Understandings no longer contained language on a ‘positive’ or ‘negative’ understanding of Art. 121(5), as this issue was addressed in the opt out regime introduced in the text.”).

309. Murphy, *supra* note 274, at 3. Murphy blames this lingering ambiguity on the “lack of rigor” amongst the States Parties in crafting and applying the amendment provisions. *Id.*

310. Murphy, however, notes that the opt-out language could be read to defeat the Positive Understanding of Article 121(5) because it links the opt out to the time when the State Party ratifies or accepts the amendment and implies that the State Party would face no exposure to the aggression amendments prior to that point. *Id.* at 5.

for a state party to ratify the aggression amendments because the provisions generate no exposure to such states absent ratification. One can imagine, however, that States Parties may ratify the amendments only to opt out of them immediately if legislators support the aggression amendments in theory, but not as applied to their nationals, and want to contribute to the thirty ratifications necessary to bring the amendments into effect.³¹¹ Such states may want to empower the Security Council to make aggression referrals, which will only happen once there are thirty ratifications.³¹² As a wait-and-see approach, legislators might also avail themselves of the opt out to gauge how the court handles aggression prosecutions in early cases before committing their nationals to potential prosecutions.³¹³ Or, a state might later utilize the opt-out option if it perceives that aggression prosecutions have become overly politicized.³¹⁴ A state party may also ratify and then opt out of the amendments in an abundance of caution given the ambiguity surrounding the interpretation of Article 121(5). Indeed, this opt-in/opt-out option gives States Parties the best of both worlds: by accepting the amendments, they are able to benefit from the deterrent effect (if any) of the aggression amendments vis-à-vis accepting and non-opting-out States Parties that might commit an act of aggression against them; at the same time, their nationals are excluded from prosecution absent a Security Council referral.³¹⁵ In any case, it remains to be seen whether the court will effectively dismantle the opt out altogether by ruling that the aggression amendments are governed by the plain language reading of the second sentence of Article 121(5) (or Article 121(4) for that matter). Although the logic of the opt out certainly tilts in favor of the Positive Understanding, the Negative Understanding is by far the most natural and logical interpretation of the text itself, which puts the utility of the opt out in jeopardy especially in light of the principle of lenity.³¹⁶

311. Aggression Resolution, *supra* note 1, Annex I, arts. 15bis(2), 15ter(2).

312. *Id.* at Annex III, para. 1.

313. See Murphy, *supra* note 274, at 4 (setting forth reasons a State Party may ratify the amendments and then immediately opt out of them); Trahan, *supra* note 80, at 80 n.132 (same).

314. Trahan, *supra* note 80, at 81 n.132.

315. Manson, *supra* note 93, at 431. The opt out applies only to prosecutions involving an act of aggression committed by States Parties and not an act of aggression committed against such Parties on, for example, their territory. Thus, the operation of the second sentence of Article 121(5) and the opt out in Article 15bis(4) are not co-extensive or duplicative.

316. See *supra* text accompanying note 195.

Some ambiguity surrounds the timing and mechanics for exercising the opt out. First, as written, the opt-out provision is geared toward potential aggressor states,³¹⁷ rather than potential victim states,³¹⁸ even though there may be situations in which the latter would not want the court to prosecute crimes of aggression committed on their territory. Examples of this might be where an investigation or prosecution might antagonize the situation, the dispute has been satisfactorily resolved through diplomatic channels or the prosecution might require the production of sensitive national security information. Thus, the court will still be able to prosecute acts of aggression committed on the territory of a state party that has opted out of the amendments, so long as the aggressor state is a State Party that has not also opted out.³¹⁹ As a practical matter, however, a case that does not enjoy the support of the victim state would be exceedingly difficult to prosecute.

Second, some questions have been raised as to whether a state party can avail itself of the opt out without subsequently accepting or ratifying the amendments because the resolution text provides that the opt-out declaration is to be lodged *prior* to ratification or acceptance.³²⁰ As a matter of logic, the opt out is likely meant to serve as an incentive for ratification, but there is little in the record about the intentions of the ABS group or Canada (or, for that matter, the members of the Assembly of States Parties that adopted the President's final package) in this regard. In addition, the opt-out option forms part of the aggression amendments, so presumably it is only available to those States Parties that ultimately ratify or accept the amendments. Otherwise, the opt out might be construed as a treaty

317. There had been some discussion of extending an opt out to Non-Party States, which would have been unique in providing treaty-based rights to Non-Party States. See June 2005 SWGCA Report, *supra* note 20, ¶¶ 5–9 (discussing opt-out and opt-in options); Int'l Criminal Court, Assembly of States Parties, Special Working Grp. on the Crime of Aggression, 8th Sess., Nov. 18–26, 2009, *Informal Inter-Sessional Meeting on the Crime of Aggression*, ¶¶ 40–41, U.N. Doc. ICC-ASP/8/INF.2 (2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-INF.2-ENG.pdf.

318. See *supra* note 296 (referring to acts of aggression committed by the State Party lodging the opt-out declaration).

319. Murphy, *supra* note 274, at 5–6 (noting the problem with lack of reciprocity in the opt out).

320. See Aggression Resolution, *supra* note 1, at 17 (noting that “any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance”). The text of Article 15bis(4) simply assumes that the opt-out declaration has been submitted prior to the initiation of a case. *Id.*

reservation, which would be prohibited by Article 120 of the Statute.³²¹

Third, it is not entirely clear how far in advance of any investigation or prosecution a state party will have to have lodged its declaration to invoke it. Presumably, a state party could not attempt to ratify the amendments and enter the opt-out declaration after an investigation into potential acts of aggression has already been initiated.³²² However, nothing in the text of the amendments would prevent this except the inclusion of the word “previously” in the opt-out language.³²³ The inclusion of the term “previously” implies that an opt-out declaration is to come in advance of ratification. Since the definition of the crime of aggression includes the *actus reus* of “planning” an act of aggression,³²⁴ the court’s jurisdictional *ratione temporis* may be extended back in time considerably, which may limit states’ ability to game the system with a strategically timed opt out.

Fourth, one can imagine the lodging of an opt out tailored to certain situations (e.g., with respect to NATO operations, a particular conflict or a particular adversary).³²⁵ Presumably, if a state can opt out altogether, it can also declare only a partial opt out pursuant to the principle that the greater includes the lesser. Finally, an additional ambiguity in the opt-out language concerns situations in which a potential defendant is a citizen of a state party that has lodged an opt-out declaration but acted on behalf of a state party that did not.³²⁶

321. For a discussion, see Dapo Akande, *What Exactly Was Agreed in Kampala on the Crime of Aggression?*, EJIL TALK! (June 21, 2010), <http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>; Coracini, *supra* note 42, at 778.

322. See Trahan, *supra* note 80, at 80 n. 132 (arguing that a state might utilize the opt out on the eve of launching an act of aggression, or an operation that might be perceived as such).

323. Aggression Resolution, *supra* note 1, Annex I, art. 15bis(4). Had drafters wanted to exclude this possibility, they should have included language to the effect that the opt out was available “irrespective of ratification.”

324. *Id.* Annex I, art. 8bis(1).

325. Murphy, *supra* note 274, at 5 (questioning whether the opt out involves a binary choice).

326. Such situations are likely to be rare, but the court already has one case presenting similar facts. Jean-Pierre Bemba Gombo is a citizen of the Democratic Republic of Congo (DRC) who is being prosecuted for crimes committed in the Central African Republic (CAR). Bemba had been the commander of the *Mouvement de Libération du Congo*, one of the parties in the Second Congo War (1998–2002) in the DRC. In 2002, the then-President of the CAR Ange-Félix Patassé allegedly recruited Bemba to assist him in quashing his own rebel movement. The charges against Bemba stem from his activities in this capacity rather than his activities in his own state, the DRC. See *Prosecutor v. Bemba*, Case No. ICC-

Under these circumstances, the court would have to decide if individuals may invoke for their benefit any opt-out declaration filed by their state of nationality or the state on whose behalf they acted, or both. Since the opt out is designed to shield state action from scrutiny by the court, the status of the putative aggressor state is likely more relevant than the home nation of the individual, but this remains to be determined.

In the end, this provision may prove to have been more useful to garner consensus in Kampala than for its functionality. This was the case of its likely inspiration, Article 124 of the ICC Statute,³²⁷ the so-called “Transitional Provision.”³²⁸ That Article allows States Parties to opt out of the war crimes provisions for a single period of seven years. The idea behind Article 124 was to give states that considered themselves to be disproportionately vulnerable to war crimes charges (due, for example, to their high overseas troop commitments or regular involvement in ameliorating humanitarian crises)³²⁹ time to assess the performance of the court before opening themselves up to potential prosecution for the most probable of charges.³³⁰ The provi-

01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>. The involvement of high-level mercenaries in acts of aggression presents another potential example.

327. *See supra* note 157.

328. The consideration of Article 124 was the only mandatory agenda item for the Review Conference. *See supra* note 157 (“The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.”). Although it had been little used, its potential deletion remained controversial. In Kampala, several States Parties (for example, France and Japan) and Non-Party States (for example, Laos and the Philippines) argued in favor of its retention as a means to assist other hesitant states in joining the court. Delegates to the Kampala Conference ultimately left the provision in place and unchanged to encourage other Non-Party States to join the court. *See* Res. RC/Res.4, U.N. Doc. RC/Res.4 (June 10, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4 -ENG.pdf.

329. *See* John R. Bolton, Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002) (noting that “US military forces, civilian personnel and private citizens are active in peacekeeping and humanitarian missions in almost 100 countries at any given time.”), *available at* http://stage.amicc.org/docs/Bolton11_14_02.pdf; *see also* Gergana Halpern, *The Crime of Aggression and the United States: Negotiations of the International Criminal Court*, THE AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INT’L CRIMINAL COURT (Oct. 1, 2007), <http://www.amicc.org/docs/Crime%20of%20Aggression%20and%20the%20US.pdf>.

330. By way of background, Article 124 was essentially the price paid to have France accept the final package of provisions revealed at the close of the Rome Conference in 1998. During the negotiations, France—along with the United States and other delegations—sought a consent-based approach to jurisdiction over war crimes and crimes against

sion was immediately and vociferously denounced by human rights groups,³³¹ though their concerns about its use turned out to be overblown and unfounded. In the end, only two countries—France and Colombia—have availed themselves of the war crimes opt-out option to date.³³² France, without explanation, withdrew its opt-out declaration in August 2008.³³³ Colombia's declaration expired by its own terms in 2009.³³⁴ Other states, such as Burundi, apparently contemplated lodging an Article 124 declaration but declined to take advantage of this option due to internal political dynamics and/or pressure from civil society organizations.³³⁵ Article 124 ultimately had more impact at Rome in getting the final package accepted than it did in securing more widespread ratification of the Statute post-Rome. States parties in favor of enforcing the crime of aggression are no doubt hopeful that Article 15bis(4) will serve little more than the same purpose post-Kampala.

humanity that would allow the ICC to prosecute these crimes only with the consent of the nationality and territorial state, absent a referral by the UN Security Council. As an alternative proposal, the United Kingdom, with support from the other P-5, proposed an Optional Protocol that states could ratify to exempt their nationals from war crimes or crimes against humanity prosecutions. Germany proposed an alternative solution that addressed only war crimes, was non-renewable, and allowed states to consent to jurisdiction *à la carte* over particular war crimes. In the waning days of the Rome Conference, the Bureau released a carefully balanced package of compromises that included Article 124. See generally Roger Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010*, 2 GÖTTINGEN J. INT'L L. 689, 691–92 (2010); Shana Tabak, Note, *Article 124, War Crimes, and the Development of The Rome Statute*, 40 GEO. J. INT'L L. 1069 (2009).

331. See, e.g., Amnesty International, *supra* note 28, at 10 (calling Article 124 a “licence to kill”); *Colombia's ICC Declaration a “Prelude to Impunity,”* HUMAN RIGHTS WATCH (Sept. 5, 2002), <http://www.hrw.org/en/news/2002/09/05/colombias-icc-declaration-prelude-impunity> (critiquing Colombia's Article 124 declaration).

332. Tabak, *supra* note 330, at 1085–94.

333. *Id.* at 1087.

334. *Delivering on the Promise of a Fair, Effective and Independent Court, Review Conference of the Rome Statute, Article 124*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=article124> (last visited Apr. 17, 2011); see also Tabak, *supra* note 330, at 1090.

335. Tabak, *supra* note 330, at 1094–95.

2. The Exclusion of Non-Party States

The second price to be paid for the removal of an exclusive Security Council filter was the provision exempting Non-Party States from the aggression provisions.³³⁶ Even during the early negotiations surrounding the ICC, the United States and other states had advocated for the position that the court should not exercise jurisdiction over the nationals of Non-Party States.³³⁷ As such, Article 12(2), which enables the court to prosecute crimes committed on the territories of States Parties in addition to crimes committed by the nationals of States Parties, was a major disappointment for the U.S. delegation at Rome and provided one basis for the United States's subsequent rejection of the court.³³⁸ The Non-Party State exclusion in the aggression amendments thus represents a major victory for the United States and a vindication of its prior position.

The new provision is unique in specifically excluding Non-Party States from the terms of a treaty³³⁹ and could be construed as a disincentive for current non-parties wary of the amendments to join the court. As a negotiating tactic, it can be considered little more than a bribe to the P-3 to relinquish Security Council control over aggression prosecutions, as it leaves the nationals of the P-3 immune from prosecution. Of course, these individuals would likely have been immune as a practical matter through operation of Article 16, but the exclusion of Non-Party States grants the P-3 immunity without them having to bear the costs of engaging in self-dealing via their Article 16 deferral powers. At the same time, the exclusion of Non-Party States defuses the ability of these states to critique, or attempt to influence the interpretation of, the aggression amendments because such states are entirely excluded from them.

336. Aggression Resolution, *supra* note 1, Annex I, art. 15bis(5).

337. In making these arguments, the United States drew on Article 34 of the Vienna Convention on the Law of Treaties, which states: "A treaty does not create either obligations or rights for a third State without its consent." Vienna Convention, *supra* note 61, art. 34.

338. See John Bolton, *Speech Two: Reject and Oppose the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? THREE OPTIONS PRESENTED AS PRESIDENTIAL SPEECHES 37 (1999).

339. AUST, *supra* note 71, at 257–58 (discussing the way in which treaties may provide rights for third states).

D. Delay

Delaying the adoption of the aggression amendments altogether would no doubt have been preferable to a number of states in attendance in Kampala. The possibility of a definition-only outcome remained a distinct possibility during the negotiations, although many states would have perceived this as a failure of the Review Conference.³⁴⁰ Members of the P-5 in particular found complete delay appealing and argued in favor of taking the time to reach a more solid consensus on the aggression amendments.³⁴¹ They coupled this claim with arguments that it was premature to evaluate the court's success vis-à-vis its current mandate.³⁴² In particular, it was noted that the court has yet to reach a verdict in its one case currently on trial, the other cases are all still in pre-trial proceedings, one of the defendants has twice been ordered released due to prosecutorial misconduct,³⁴³ the charges against another defendant were not confirmed,³⁴⁴ the majority of the other arrest warrants remain unexecuted³⁴⁵ and the court has been mired in important yet peripheral pretrial rulings. A delay, it was argued, would give the court more time to perfect its work in its areas of core competency before adding a new and qualitatively different crime to its repertoire, with no new resources to boot.

340. Wenaweser, *supra* note 51, at 884 n.4 (noting that some delegations would have considered a definition-only outcome to be "worse than a problematic full package").

341. Koh, U.S. Intervention, *supra* note 36.

342. Wenaweser, *supra* note 51, at 884 (noting the view that the ICC was not ready to take on aggression cases).

343. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 17, Decision on the Prosecutor's Request To Give Suspensive Effect to the Appeal Against Trial Chamber I's Oral Decision To Release Mr. Thomas Lubanga Dyilo (July 23, 2010), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc912271.pdf>. Ultimately, the Appeals Chamber ruled that a stay and the release of the defendant was not an appropriate response to the misconduct; rather, sanctions should be imposed on the prosecutor. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 17, Judgment on the Appeal of Prosecutor Against the Oral Decision of Trial Chamber I of 15 July 2010 To Release Thomas Lubanga Dyilo (Oct. 8, 2010), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc947862.pdf>.

344. Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Feb. 8, 2010), *available at* <http://www.icc-cpi.int/NR/exeres/586C0B9F-685C-4A05-B0EF-702A23A4B6F9.htm>.

345. None of the Ugandan defendants is in custody, notwithstanding that Uganda self-referred the situation involving the Lord's Resistance Army to the court. In the Darfur case, three rebel defendants appeared voluntarily, but the defendants associated with the government remain at large, including Sudanese President Omar Al-Bashir.

To a certain extent, the P-5's fixation on achieving a delayed adoption was short-sighted. A review of the trend in the negotiations since the ICC project was revived reveals the gradual (though not linear) expansion of the definition of aggression and liberalization of the jurisdictional regime over the years.³⁴⁶ Time, in short, has not been on the side of the P-5. It is thus not clear whether the P-5 could have achieved a better outcome with more time. It was perhaps just as likely that time would result in a greater expansion of the court's ability to prosecute the crime of aggression and a further contraction of the Security Council's control over the process. More time, however, would certainly have enabled the United States to become more actively engaged in the negotiations without having to rely on the P-4, or the P-2 for that matter, to make its arguments for it.

Notwithstanding a preference for a delay altogether, it soon became clear that it was virtually inevitable that states would achieve some measure of completion in Kampala given the almost palpable momentum toward finishing the work left over from Rome and fulfilling—if only symbolically—the final component of the Nuremberg legacy. Indeed, the threat to resume the negotiations in New York at a subsequent meeting of the Assembly of States Parties, or even to convene another Review Conference in a more accessible locale, loomed large. Presumably a point was eventually reached at which all parties concluded that they were at their maximum negotiating leverage in Kampala, prompting delegates to reach some measure of completion.

E. Staggered Entry Into Force

In lieu of total deferral, many of the proposals being tossed about in Kampala hinged on a delayed activation of the amendments, either in whole or in part.³⁴⁷ The ABS proposal³⁴⁸ broke new ground by suggesting a springing or staggered entry into force for the various trigger mechanisms. The vision was that the Council trigger would

346. Early drafts of the aggression provisions, for example, envisioned an exclusive Security Council filter. See Draft Report of the Intersessional Meeting from 19 to 30 January in Zutphen, the Netherlands, in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY*, *supra* note 102, at 221, 238 (containing draft Article 10 envisioning filter role).

347. See Wenaweser, *supra* note 51, at 887 (considering the delayed activation of the amendments to be of less relevance than other compromises forged in Kampala, such as the opt out for States Parties and the exclusion of Non-Party States).

348. See *supra* text accompanying note 148.

be operative first to be followed by the eventual activation of other trigger mechanisms. Supporters argued that this would give the Council a chance to control aggression prosecutions initially, providing the court with time and space to develop its standards and jurisprudence in tandem with the Council before accepting cases that did not enjoy the Council's full support. Such a phased entry into force could hinge on a performance-based evaluation of the first phase—whereby phase two would only be implemented in the event the phase one proved successful.

Under such a system, phase one would provide an opportunity for the international community to review the Council's management of its trigger power, the court's handling of aggression cases, the adequacy of existing resources and the very viability of the provisions. This would ensure that negotiators did not lock in a scheme that later proved to be unworkable. State parties would be entitled later to affirmatively launch phase two, perhaps in the context of another Review Conference with an agenda and metrics defined in advance. In the alternative, phase two could be effectuated automatically after the passage of a certain amount of time or the ratification by a certain number of States Parties. The promise of a Review Conference was also dangled as an incentive to states to accept some provisional operationalization of the crime in exchange for the opportunity to subsequently review the definition of aggression and all the other controversial provisions at a later date.

Surprisingly, perhaps, the P-5 were lukewarm on the idea of granting the Council the immediate power to activate the court's jurisdiction over the crime of aggression and delaying the other two trigger mechanisms. Indeed, it was clear over the course of the negotiations that the P-5 believed that they had little to gain from adding aggression at all to the ICC Statute. Although the crime of aggression was billed as a judicial tool the Council could use for dealing with rogue leaders who could not readily be prosecuted for one of the other three ICC crimes, it was an unwanted addition to the Council's toolbox.³⁴⁹ They were perhaps concerned that as soon as the Council could instigate prosecutions for the crime, it would come under pressure from states and non-governmental organizations to do so in this or that incident. Moreover, throughout the period of probational jurisdiction, detractors would be gathering fodder for subsequent ar-

349. Alternatively, Murphy notes that the ability to refer matters to the court might allow the Council to avoid dealing with a matter and escape its responsibilities. Murphy, *supra* note 274, at 11.

guments against Council control over the process, redoubling their commitment to operationalizing the alternative triggers and filters.

In the end, the final package avoids the hard issues and delays both Article 15bis and 15ter until a subsequent decision of the Assembly of States Parties.³⁵⁰ It appears that the different trigger mechanisms may be subject to separate votes; as a result, there is a chance that only one or the other would be adopted in 2017, with the Security Council trigger being perhaps the most vulnerable to rejection in this regard. The final draft thus laid the groundwork for a further erosion of the role of the Council in responding to threats to the peace. It remains to be seen whether the Assembly of States Parties will convene a new Review Conference for this decision or simply add it to the agenda of a regular meeting. It certainly seems that a decision of this magnitude and importance should be taken at a Review Conference, especially given that the priorities of the court and global conditions will inevitably change considerably in the next seven years. All that said, the aggression provisions could be amended in the meantime or the decision could be postponed even further.

F. Activation Mechanism

Going into Kampala, academic commentary and diplomatic interventions split on which amendment regime governed the aggression amendments.³⁵¹ The legal arguments in favor of one interpretation or another were marshaled at the service of political preferences for the different practical consequences of the competing models. Three factors in particular governed states' preferences: the speed at which the amendments would enter into force, the question of state consent and the application to Non-Party States.

An argument against the application of Article 121(5) was that the amendments would enter into force piecemeal and only with respect to the States Parties that had accepted them and that this would create a potentially confusing patchwork of acceptances that might stymie aggression prosecutions, especially in situations in

350. ICC Statute, *supra* note 3, arts. 15bis(3), 15ter(3).

351. See, e.g., Roger S. Clark, *The International Criminal Court and the Crime of Aggression: Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute*, 41 CASE W. RES. J. INT'L L. 413 (2009) (discussing controversy over amendment provisions and concluding that Article 121(4) applies to the crime of aggression); Donald M. Ferencz, *Addendum to the Aggression Issue: Bringing the Crime of Aggression Within the Active Jurisdiction of the ICC*, 42 CASE W. RES. J. INT'L L. 531 (2009) (discussing alternative formulations); see also *supra* Part III.B.1.

which multiple states were involved. As compared to Article 121(5), the operation of 121(4) was always relatively straightforward,³⁵² which was a perennial argument in its favor. Article 121(4), however, threatened to move the court away from universal ratification if objecting States Parties exercised their right to withdraw from the Statute rather than subject their territories to aggression prosecutions.

By contrast, Article 121(5) would enable States Parties that might object to the aggression provisions to remain members of the court rather than undertaking the more drastic measure of withdrawing as they might do under an Article 121(4) regime. Article 121(4) also created opportunities for obstructionism, as a dozen or so hold-outs could prevent the amendments from ever entering into force. Proceeding under Article 121(4) might also unleash a “cold war” among the Assembly of States Parties, as states jockeyed to achieve, or hinder, the attainment of seven-eighths ratification.³⁵³ Under these circumstances, the ratification process would distract States Parties, and Non-Party States, from more constructive cooperation with the court.

Negotiations over the operative entry into force language were complicated by the fact that delegates were at the same time considering another proposed amendment to the Statute. This was the proposal by Belgium to add several war crimes to the provisions governing non-international armed conflicts and better harmonize those provisions with the war crimes prosecutable in international armed conflicts.³⁵⁴ It was understood that absent some principled reason to treat aggression differently, whatever interpretation adopted for the addition of the crime of aggression would also govern the Belgian amendment.³⁵⁵ The resolution adopting the Belgian amendment contains a literal plain language interpretation of Article 121(5)

352. One open question concerned the fact that the seven-eighths threshold had the potential to be a moving target as more states joined the ICC Statute. In Kampala, Slovenia proposed that the threshold be set at the time the aggression amendments were adopted, but there was nothing in the text to support this interpretation.

353. This prospect was reminiscent of the United States’s Article 98 campaign under the Bush Administration. *See generally* Sean Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Bilateral Agreements Relating to ICC*, 97 AM. J. INT’L L. 179, 200 (2003) (discussing the practice of the United States, during the administration of President George W. Bush, of securing Article 98 agreements promising that treaty parties would not surrender nationals to the ICC without expressed consent).

354. *See supra* note 284.

355. Res. RC/Res.5, U.N. Doc. RC/Res.5 (June 10, 2010) *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf.

and also excludes application to Non-Party States.³⁵⁶ Arguments were put forward that the reference to the crime of aggression in the Statute in Articles 5(2) and 12(1) (which avers that States Parties accept the jurisdiction of the court with respect to all crimes referred to in Article 5, including aggression) implied some level of pre-acceptance by States Parties and thus justified a differential understanding of how the crime would enter into force.³⁵⁷ This, it was argued, necessitated the proposed “understandings.” The final resolution adopting the aggression amendments “recalls” both of these provisions, but contains no Understanding on how the various provisions should be interpreted.³⁵⁸

Indeed, this seemingly banal issue, which one would have expected to have been resolved at the threshold of the negotiations, emerged as the final point of contention and the lynchpin of the entire consensus package. The existence of two possible but fundamentally different entry-into-force regimes coupled with competing interpretations of the provisions’ impact created legal confusion throughout the negotiations. Although this confusion generated an opening for a creative, if not unfettered, juggling of elements in an effort to reach a final consensus, the tendency of particular negotiators to switch back and forth between the two sub-paragraphs of Article 121 and between the two interpretations of Article 121(5)³⁵⁹ gave the impression that the provisions of the ICC Statute have no fixed content or meaning and thus could be manipulated at will in an effort to forge a consensus or advance a particular agenda. Rather than push for a resolution of this threshold issue, the Chair prolonged the confusion. This tactic kept the delegations engaged in the process but also generated costs by enabling the promulgation of unsustainable proposals that served only to distract the negotiators. It also yielded a final consensus that is likely only an illusion of an agreement on what the text dictates. This question has thus essentially been dumped on the laps of the court’s judges.

Informal negotiations continue on the question of when States Parties are “bound” by the amendments in the absence of a Security

356. *Id.* at operative para. 2 (“in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party’s nationals or on its territory”).

357. *See supra* note 94.

358. *See* Aggression Amendments, *supra* note 3, pmbi; *see also* Trahan, *supra* note 80, at 64 n.62 (critiquing the delegates for not including a consensus interpretation for the second sentence of Article 121(5)).

359. *See supra* text accompanying notes 74–85.

Council referral.³⁶⁰ At stake are two open questions: (1) whether the nationals of States Parties that do not ratify the amendments may be prosecuted if such individuals commit the crime of aggression on the territory of any state and (2) whether a prosecution for the crime of aggression can go forward where the crime is committed on the territory of a State Party that does not ratify the aggression amendments. Proponents of the Positive Understanding are raising arguments that the reference to Article 12 in the adopting resolution of the aggression amendments and the opt-out option have effectively overridden the plain language of Article 121(5).³⁶¹ This view—which was not presented in Kampala or in any prior negotiation—depends on the piecing together of various statutory snippets though interpretive sleights of hand that should not fool the judges when confronted with the plain text of the Statute in light of standard principles of treaty interpretation.³⁶² And so, the entry into force provisions lurk in the Statute, threatening to destabilize, if not destroy, the jurisdictional regime and compromise carefully crafted in Kampala. No doubt, absent a Security Council referral, much of the first aggression prosecution will be consumed by litigation over this most basic of issues.

CONCLUSION

The aggression amendments are a triumph of voluntarism at the expense of two principled alternatives that proved ultimately incompatible. One of these two alternatives is based on the discomforting and inescapable asymmetry of power in the UN system—where sovereign equality is an abstraction rather than an empirical reality. The other model is premised on universalism—an ideal that was un-

360. See Scheffer, *supra* note 148, at 903 (arguing that “States parties and the ICC itself will need to come to grips with this issue long before 2017 and, ideally, resolve it to everyone’s firm assent so that the judges, when challenged by defense counsel in live cases regarding the crime of aggression, at least can rely on a more transparent, reaffirmed and united interpretation of the Kampala amendments among states parties and leading scholars of the ICC.”).

361. Kreß & von Holtzendorff, *supra* note 63, at 1213 (noting that the opt out was “born precisely in order to bridge the gap between those in favour of applying the jurisdictional scheme under Article 12(2) . . . without modification (ABS Proposal) and those in preference of a strictly consent-based regime (Canadian proposal).”).

362. Manson, *supra* note 93, at 423–24 (identifying the way in which bits and pieces of the amendments may be cobbled together to support the revisionist account); *id.* at 426 (noting that the Court cannot “simply ignore the plain language of [the] second sentence” of Article 121(5), which is “baggage” that cannot be severed from the text and must instead be applied, “whether welcome or not.”).

attainable in Rome, *a fortiori* so in Kampala. Indeed, if universalism could not be obtained with respect to the crimes of genocide, crimes against humanity and war crimes, the prohibition of which indisputably constitute *jus cogens*, it was folly to expect it in the aggression context. The result of this negotiating impasse is a set of amendments characterized by theoretical incoherence and profound ambiguity where a regime of state consent—in the form of a retrograde opt out and the complete exclusion of the nationals of Non-Party States—emerged as the only compromise possible. The final package, designed not with the best interests of the court in mind, has merit solely as an expedient solution that enables the Assembly of States Parties to claim completion—if not success. Aggression prosecutions will thus be left to the vagaries of States Parties' ratification decisions rather than the vagaries of the Security Council's political agenda. And yet, assuming States Parties even commence the ratification process at this stage given the conditional nature of the new provisions, national legislators have no real certainty as to what exactly they are ratifying and whether their treaty partners agree with their interpretation of the amendments, even after years of negotiations. Lost in the scramble to reach an outcome—at whatever cost to the rule of law, standard principles of treaty interpretation, UN harmony, fairness to future defendants and the court's very legitimacy—was the force of an idea: a more peaceful world.

Given that a genuine universality was never realistically possible, we are left with the question of whether the court would have been better off with a filter system under the control of the Security Council. Rather than attempting to circumvent power realities in international relations, such a system would have at least combined principle with power and potentially created a more uniform and universally applicable regime. This position might have been more palatable had the Council exhibited a more consistent and robust response to threats to the peace in the past. As it stood, however, even the most adept negotiators could not have achieved this outcome in light of the ingrained lack of support for the P-5 position and the distrust of, and even outright hostility toward, the Council among some vocal members of the Assembly of States Parties.

The P-5 was thus unable to convince their interlocutors to vest the Council with exclusive authority over aggression prosecutions. As a result, they must now decide whether to attempt to influence key states (potential coalition partners, states where there are P-5 boots on the ground, etc.) to either refrain from ratifying the aggression amendments or to activate the opt out in order to insulate embattled, or potentially embattled, swaths of territory from prosecution. States that want safety from the aggression provisions must de-

cide for themselves which of these diverging routes to take. Ultimately this choice may depend on how much confidence States Parties have in their belief that the court will adopt either the Negative or Positive Understanding of the second sentence of Article 121(5). Notwithstanding that the plain text of that provision will render it difficult for the court to reason otherwise, the safest course for states wary of the new amendments might be to ratify and then opt out of the amendments—a trickier political position for States Parties if influential elements of civil society end up rallying around full and unfettered ratification. In this regard, the coalition of states ostensibly in favor of the crime of aggression can claim victory by garnering greater formal acceptance of the amendments but at the expense of an orderly ratification process free of confusion, jockeying and manipulation.

And so, we are left with a set of aggression amendments that will spawn uncertainty and controversy given the competing interpretations of the text itself, the various opportunities to consent to or defect from the provisions and the inevitable jurisdictional patchwork that will result.³⁶³ The aggression provisions are wide open to challenge by those defendants unlucky enough to serve as guinea pigs in this grand experiment. The inaugural aggression proceedings will no doubt be consumed by pre-trial challenges to the very legitimacy of the crime and its provenance.³⁶⁴ Certainly the rogue regimes that will never join the court and fall outside of the aggression amendments are likely to view the outcome of Kampala an unmitigated success altogether, unless the Security Council proves willing to trigger aggression prosecutions. Beyond its pre-existing Article 16 deferral power, however, the Council was granted no additional powers to influence aggression prosecutions. So if the Council chooses to use its referral power, it must trust the court to get it right once the Council sets a prosecution in motion.

The ICC now faces the danger of applying an elastic and uncertain set of amendments in a fraught political context. It remains to be seen whether pushing forward on the aggression amendments under these circumstances in their current form has planted a time bomb in the ICC Statute that will indelibly harm the court or jeopardize its work in responding to atrocity crimes. Most likely, the jurisdictional regime is so cumbersome and pocked with loopholes that aggression

363. Scheffer, *supra* note 148, at 904 (anticipating the “patchy” jurisdiction of the court will undermine the principle of sovereign equality).

364. *Id.* at 903 (arguing that defense counsel will inevitably challenge the way in which the amendment provisions have been applied to the crime of aggression).

